STATE OF MICHIGAN

COURT OF APPEALS

CRANBROOK PROFESSIONAL BUILDING, L.L.C.,

Plaintiff-Counterdefendant-Appellant,

v

WILLIAM POURCHO, D.D.S.,

Defendant-Counterplaintiff/Third-Party Plaintiff-Appellee,

and

GLENN SPENCER, D.D.S.

Third-Party Defendant-Appellant.

UNPUBLISHED
February 22, 2005

No. 251422
Oakland Circuit Court
LC No. 1999-015521-CK

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Following a bench trial on Cranbrook Professional Building, L.L.C.'s (Cranbrook) claim for holdover rent and plaintiff William Pourcho, D.D.S.'s respective counterclaim and third-party claim for tortious interference with a business expectancy against Cranbrook and Glenn Spencer, D.D.S.'s (Spencer), respectively, Cranbrook and Spencer (hereafter "defendants") appeal by right the trial court's denial of their motion for either a new trial or an amendment of the July 7, 2003, opinion and judgment. The trial court found Pourcho liable to Cranbrook for $91,729.98 in holdover rent and found in favor of Pourcho on his tortious interference with business expectancy claim in the amount of $275,000. We affirm.

I

This litigation arose from a landlord-tenant arrangement between Pourcho and Cranbrook. Pourcho leased office space for the purpose of operating his dental practice, in an office building owned by Cranbrook, a company formed by Spencer and his wife as managing partners. Spencer leased space for his dental practice in an adjacent building. Pourcho's current lease expired on March 31, 1998; however, the lease agreement contained a clause providing

Pourcho an option to renew the lease for three years, if the option was exercised in writing before December 31, 1997. Pourcho did not exercise the written renewal option.

Late in 1997, after Pourcho informed Spencer of his intent to not renew the lease, Pourcho began negotiating the sale of his practice to Gary Lozenich, D.D.S. On March 25, 1998, Spencer and Lozenich executed a formal letter of intent which expired May 9, 1998, providing that Lozenich would purchase Pourcho's practice for $600,000 within forty-five days. During this same forty-five days, Lozenich would examine Pourcho's records and secure financing. Lozenich secured the necessary financing; however, because he also preferred to speak directly with Spencer concerning lease arrangements, Pourcho arranged a meeting between Spencer and Lozenich. During this meeting to discuss lease arrangements, which occurred on April 17, 1998, Spencer also shared a list with Lozenich containing the names of candidates for a potential associate or partner position with Spencer's dental practice. Lozenich was listed as a potential candidate. Following the meeting, Lozenich believed "there was nothing to buy" (concerning Pourcho's practice) because Spencer had told him that Pourcho had no lease and Spencer had no intention of renewing the lease. Moreover, Spencer indicated that any lease agreement between Spencer and Lozenich would be approximately $6,000 a month, substantially higher than the $4,000 monthly rate in Pourcho's expired lease. Ultimately, Lozenich decided not to continue negotiations with Pourcho. On May 9, 1998, the expiration date for the formal letter of intent, Lozenich rejected the $600,000 negotiated price and offered to purchase Pourcho's practice for $275,000. Pourcho attempted to contact Lozenich to make a counteroffer, but his telephone calls were not returned.

In June or July 1998, while Spencer was assessing the possibility of Lozenich associating with his practice, Lozenich received a key to Spencer's office, saw patients on a limited basis, and attended a practice seminar with Spencer. During this same period, Pourcho invited Spencer to make an offer to purchase the practice because Lozenich was no longer interested. Pourcho testified that, in the absence of an acceptable offer, he told Spencer that he wished to remain as a tenant on month-to-month basis until he could sell his practice, and that Spencer expressed his approval. Pourcho rejected Spencer's subsequent offer to purchase the practice for fifty percent of all patient fees incurred in the first year. In October 1998, Spencer gave notice to Pourcho that he intended to renovate the office space being occupied by Pourcho. Around this same time, Spencer informed Lozenich that he would not be selected to associate with Spencer's dental practice.

In February 1999, Pourcho received a thirty-day notice to quit the premises. Spencer also made one last offer to purchase Pourcho's patient files for a flat fee for each patient who remained with Spencer's practice for a maximum liability of $105,000, which Pourcho rejected. After Pourcho was evicted, Lozenich contacted Pourcho on May 14, 1999, regarding his concerns that Spencer purposefully influenced his decision to not proceed with the purchase of Pourcho's practice.

In June 1999, Cranbrook filed a complaint against Pourcho for holdover rent for the period between April 1998 and May 1999. Pourcho counterclaimed against Cranbrook and filed a third-party complaint against Spencer, alleging, among other things, tortious interference with a business expectancy.

At the conclusion of the bench trial, the trial court found Pourcho liable to Cranbrook for holdover rent in the amount of $91,729.98 and found Spencer liable to Pourcho for tortious interference with Pourcho's business expectancy with Lozenich in the amount of $275,000. The opinion did not address Pourcho's tortious interference claim against Cranbrook. The trial court, on an unrelated issue, granted defendants' motion for a new trial. This Court reversed after plaintiff filed an interlocutory appeal. See *Cranbrook Pro Bldg v Pourcho*, 256 Mich App 140; 662 NW2d 94 (2003). On remand, the trial court granted Pourcho's motion seeking clarification of its initial judgment because it failed to address Cranbrook's liability, and amended the judgment to reflect that Spencer and Cranbrook were jointly and severally liable. The trial court denied defendants' subsequent motion for a new trial or an amended judgment on the basis that joint and several liability was improper in this case. This appeal ensued.

II

This Court reviews for an abuse of discretion the trial court's refusal to grant a new trial. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). An abuse of discretion occurs when the trial court misapprehends the law to be applied. *Bynum v ESAB Group*, *Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002). Thus, a motion for a new trial on the basis of error in the application of the law is subject to de novo review. *Schellenberg v Rochester, Michigan, Lodge No 2225, BPOE*, 228 Mich App 20, 28; 577 NW2d 163 (1998). In a bench trial, we review for clear error the findings of fact supporting the decision, *Featherston v Steinhoff,* 226 Mich App 584, 587; 575 NW2d 6 (1997), including a trial court's damage findings. *Radloff v Michigan (On Remand)*, 136 Mich App 457, 459-460; 356 NW2d 31 (1984). A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Featherston, supra* at 588.

III

A

Defendants argue that the trial court should have granted a new trial because it erroneously applied the law in finding that the evidence supported Pourcho's claim for tortious interference with a business expectancy. We disagree.

Case law in Michigan recognizes that liability may be imposed for improper conduct that prevents a party from continuing a business relationship. *Winiemko v Valenti*, 203 Mich App 411, 416; 513 NW2d 181 (1994). To establish a claim for tortious interference with a business relationship or expectancy, the plaintiff must establish "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) (citation omitted).

Defendants first assert that the business relationship between Pourcho and Lozenich was too tenuous to constitute a valid business relationship or expectancy. We disagree. To be valid, a business "expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *First Public v Parfet*, 246 Mich App 182, 199; 631 NW2d 785 (2001) (citation

omitted). The record evidence shows that Lozenich and Pourcho negotiated the sale of Pourcho's practice for several months, culminating in a February 25, 1998, preliminary letter of intent and a March 25, 1998, formal letter of intent. Further, Lozenich obtained financing from Comerica Bank and American Medical Capital. This evidence clearly demonstrates that the business relationship was more than "a mere hope or the innate optimism of the salesman." *Joba Constr Co v Burns & Roe,* 121 Mich App 615, 635; 329 NW2d 760 (1982) (citation omitted). Given this evidence, the trial court's finding that there was a valid expectancy was not clearly erroneous

Defendants next contend that there was no evidence that either Spencer or Cranbrook improperly interfered with the prospective business relationship. Defendants assert that Spencer's contacts with Lozenich had no bearing upon Pourcho's business expectancy because Pourcho, by failing to accept Lozenich's second offer of $275,000, terminated the negotiations. We disagree. To demonstrate improper interference with a business expectancy, a 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 contractual rights or business relationship of another." *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). "A "per se wrongful act" is an act that is inherently wrongful or one that is never justified under any circumstances." *Formall v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988). "If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002) (citation omitted); see also *BPS Labs v Blue Cross (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996). "Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *Id.* However, just because certain actions are taken "with the intent that they inure to the personal or pecuniary benefit of the defendant cannot, per se, in our view, weave a broad and impenetrable blanket of immunity from liability for those actions." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 96; 443 NW2d 451 (1989) (rejecting an absolute defense based upon business motivations in tortious interference with contractual relationship claims).

In this case, the trial court concluded that although Spencer had the right to refuse to extend Lozenich's lease, it was the continuous contacts between Spencer and Lozenich and not Spencer's failure to extend the lease which caused the termination of the relationship between Lozenich and Pourcho. At a later hearing on a different matter, the trial court explained that it had concluded that Spencer was manipulating the events and involving himself in manner beyond that required by a landlord when he attempted to "woo" Lozenich and purchase Pourcho's practice at a substantial discount.

The record supports the trial court's findings. Significantly, Lozenich testified that both his discussions with Spencer and the April 17, 1998, list Spencer gave him regarding their potential professional association affected his decision not to purchase Pourcho's practice. Lozenich further testified that he felt used and misled by Spencer. The trial court could conclude from Lozenich's testimony and the chronology of Spencer's acts that Spencer attempted to benefit himself at Pourcho's expense. At trial, Spencer expressed his preference to terminate his lease in the adjacent office building and establish his practice in his building. The record also shows that while the March 25, 1998 formal letter of intent was effective, Spencer and Lozenich

had already begun a preliminary association. First, the list of potential candidates prepared in finding a potential partner or associate doctor was given to Lozenich and Spencer's initial meeting, which supported a reasonable inference regarding his ulterior motives that he planned to influence Lozenich. The record evidence shows that Spencer and Lozenich discussed the $275,000 reduced offer before it was presented to Pourcho. Finally, Lozenich testified that Spencer suddenly terminated their association just as he was preparing to join Spencer's practice. Given this evidence and its superior ability to assess credibility, the trial court could reasonably conclude that Spencer acted to sabotage the sale between Pourcho and Lozenich in order to effectuate a plan to establish his practice in Pourcho's office space with Pourcho's former patients at a far reduced price. While defendants presented evidence that the presence of a lease was an important element to the transaction, the record shows Lozenich's willingness to proceed, albeit at a lower price, even in the absence of a long-term lease and it was a matter for the trial court as the factfinder to assess Spencer's credibility to determine whether his initial and continued contacts with Lozenich negatively impacted the business expectancy. MCR 2.613(C). Because the record contains evidence of specific affirmative acts by Spencer supporting the trial court's finding of an improper purpose or motive, we are not compelled to conclude that a mistake has been made.

B

We similarly reject defendants' argument challenging the trial court's damage findings. In a claim involving tortious interference of a business expectancy, the proper measure of damages may include "(a) the pecuniary loss of the benefits of the contract or the prospective relation; (b) consequential losses for which the interference is a legal cause; and (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference." *Great Northern Packaging, Inc v Gen Tire & Rubber Co,* 154 Mich App 772, 785; 399 NW2d 408 (1986), citing 4 Restatement Torts, 2d, § 774A(1), pp 54-55.

In the present case, the trial court valued the benefit of the prospective business relationship between Lozenich and Pourcho at $275,000. The trial court concluded that Pourcho's failure to exercise the renewal option reduced the value of the expectancy, i.e. the purchase of his practice, to $275,000 as reflected in Lozenich's counteroffer.

Because we previously concluded that the trial court did not err in concluding that defendants had a direct role in Lozenich's $275,000 offer to Pourcho, we find no error. More importantly, as plainly set forth in *Great Northern Packaging, supra,* and contrary to defendants' argument, Pourcho was not strictly limited to an award on the basis of net profits. Evidence was presented that in addition to the lost sale with Lozenich, Pourcho's suffered a fifty percent loss of profits from the time he was evicted and the time required to re-establish his practice. Pourcho also incurred additional expenses when he purchased subsequent office space for $340,000 and incurred $170,000 in renovating expenses. Because this evidence would support a higher amount than the trial court's actual award, the award is neither excessive nor speculative. The trial court properly denied defendants' motion for a new trial on this basis.

C

Defendants' final contention is that the trial court erroneously found Cranbrook and Spencer jointly and severally liable for tortious interference contrary to MCL 600.2956. In their

motion for an amended judgment or new trial, defendants argued that the trial court improperly pierced the corporate veil in finding defendants jointly and severally liable, and that finding of joint and several liability against defendants was precluded. Defendants did not assert below, however, that a joint and several award was contrary to MCL 600.2956, and thus, this assertion is not properly preserved for appeal[1] and we decline to address it. *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003) (issues first raised on appeal need not be addressed by the appellate court).

IV

Because the trial court did not erroneously apply the law of tortious interference with a business expectancy and there was ample evidence to support its findings, the trial court's refusal to grant a new trial on any of the grounds raised was not an abuse of discretion.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder

[1] It is well established that an objection based on one ground is insufficient to preserve for appellate review an argument based on a different ground. *Kubisz v Cadillac Gage, Inc,* 236 Mich App 629, 637; 601 NW2d 160 (1999).