

STATE OF MICHIGAN
COURT OF APPEALS

LIGHTHOUSE SPORTSWEAR, INC.,

Plaintiff-Appellant,

v

MICHIGAN HIGH SCHOOL ATHLETIC
ASSOCIATION, INC., ETHNIC ARTWORK,
INC. d/b/a EA GRAPHICS, and ROBERT
ARTYMOVICH

Defendants-Appellees.

UNPUBLISHED

July 2, 2013

No. 310777

Ingham Circuit Court

LC No. 11-000854-CK

Before: Saad, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Plaintiff, Lighthouse Sportswear, Inc., appeals a stipulated order of dismissal and claims that the trial court erred when it granted in part defendants' motions for summary disposition. For the reasons set forth below, we affirm.

I. FACTS

For 14 years, Lighthouse and defendant, Michigan High School Athletic Association (MHSAA), entered into royalty agreements for Lighthouse to produce MHSAA apparel. In December 2008, Lighthouse and MHSAA executed their last agreement, for August 1, 2009 to July 31, 2011. The agreement gave Lighthouse the exclusive right to distribute premium items at final level and pre-final level tournaments. Lighthouse's breach of contract claims arose from paragraph 31 of the royalty agreement, which provides:

The term of this agreement shall be from August 1, 2009 to July 31, 2011. This agreement shall automatically be lengthened by one (1) year if neither party serves written notification by March 31 of the current school year, beginning during the 2009-10 school year. Lighthouse Sportswear, Inc., shall have the option in each year of this agreement to renew until the date of termination by, not later than March 31, meeting terms of any unsolicited offer considered more favorable by the MHSAA and in its possession prior to January 1.

a. The interpretation of this paragraph, by way of example is as follows:

1. Neither the MHSAA nor Lighthouse Sportswear, Inc., may terminate the agreement for 2010-11 unless one notifies the other in writing by July 31, 2009 that it will not automatically renew the agreement.
2. Furthermore, should the MHSAA receive an unsolicited offer prior to January 1, 2010 from another vendor to provide the services covered by this agreement for 2010-11, Lighthouse Sportswear, Inc., shall have until March 31, 2010 to meet the terms of that offer.

In March 2010, Lighthouse allegedly received a call from a third party, who sought business information pertaining to the agreement between Lighthouse and MHSAA. Lighthouse refused to give the person any information and later learned that the caller was an associate of defendant EA Graphics. Around April 2010, MHSAA drafted a memo to potential merchandise vendors, outlining the process for submitting proposals to MHSAA for future seasons. In July 2010, MHSAA sent Lighthouse a letter stating that “MHSAA will not automatically renew or extend its agreement with Lighthouse Sportswear, Inc., for MHSAA tournament merchandise and related services after July 31, 2011.” Thereafter, Lighthouse learned that MHSAA chose EA Graphics as its new vendor.

II. STANDARDS OF REVIEW

We review de novo a decision on a motion for summary disposition. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint based on the pleadings. *Dalley v Dykema Gossett*, 287 Mich App 296, 304; 788 NW2d 679 (2010). In other words, without reviewing any documentary evidence, the court determines whether the opposing party stated a claim upon which relief could be granted, based on the court’s acceptance of any well-pleaded facts and viewing the allegations in a light most favorable to the nonmoving party. *Id.* at 304-305. The court should only grant a motion if no factual development could provide the nonmoving party with a right to recovery. *Id.* at 305.

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint.” *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). The court must view all the admissions, affidavits, depositions, pleadings, and other documentary evidence available at the time of the motion in a light most favorable to the nonmoving party and determine if genuine issues of material fact exist. *Reed*, 475 Mich at 537. “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.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). If no genuine issues of material fact remain, then the moving party is entitled to judgment as a matter of law. *Reed*, 475 Mich at 537. “The proper interpretation of a contract is also a question of law that this Court reviews de novo.” *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562, 567 (2012).

III. ANALYSIS

Lighthouse argues that the trial court erred in dismissing its contract claims pursuant to MCR 2.116(C)(10). The parties agree with the trial court that the automatic renewal provision of the royalty agreement is ambiguous. The trial court found a patent ambiguity because paragraph 31 states that the agreement will automatically renew for a year if neither party serves written notification by March 31, but later states that notification must be served by July 31. However, there is no genuine issue of material fact on the question of whether the parties intended and conducted themselves with the understanding that the deadline was July 31.

On May 5, 2008, Cyle Cornish, a manager at Lighthouse who was involved in all aspects of the negotiations of the royalty agreement, sent a letter to John Roberts, Executive Director of MHSAA, and John Johnson, the MHSAA's communications director. Cornish specifically asked for an automatic renewal provision and proposed:

Each year the MHSAA would have until *July 31* to announce that the contract will be up for bid that fall according to the current contract terms and conditions. The current vendor's contract would otherwise renew automatically for a period of one year on August 1 if no such announcement is made. [Emphasis added.]

Thus, MHSAA is correct that it was originally Lighthouse's idea to make the cutoff date July 31. Indeed, on September 24, 2008, MHSAA sent Cornish a copy of the proposed royalty agreement which included the July 31 cutoff date in paragraph 31 and, in an email response, Cornish said "[t]he current updated version of the working agreement appears fine." Thereafter, the parties did discuss various cutoff dates to give each party sufficient transition time for the next school year. Johnson sent an email to Cornish on November 13, 2008, in which he attached a draft copy of the agreement. He noted that it reflected a July 31 cutoff date but, "[h]adn't we talked about making that earlier in the year, like perhaps April, to allow for more transition time should it occur?" In response, Cornish wrote to Johnson on November 13, 2008 that July 31st of the preceding year seemed like a logical date because the contract runs from August 1st to July 31st. So, again, it appears Cornish wanted a July 31 cutoff in the preceding year. Cornish noted that, in the past, they had a cutoff date of April 15th, but that was in order to dissolve the agreement "*at the end of that school year* by mutual agreement of both parties." (Emphasis added.) Nonetheless, Cornish commented that it would be better to have more time than less. This exchange apparently resulted in the ambiguous contract, containing both the March and July cutoff dates, signed in December 2008. However, Cornish specifically stated that the interpretation examples in the contract, which reflected the July 31 date, provided the correct clarification, even though Lighthouse now claims that the same example created the ambiguity.

Thereafter, in July 2009, MHSAA notified Cornish that it would not automatically renew the royalty agreement, which applied to the 2010-2011 school year. Cornish did not dispute the July 2009 notification and, in an email sent on August 3, 2009, he wrote:

While your decision comes as a disappointment, I understand that right now 2010-2011 seems, in some regards, to be a long time away.

After 12 years it continues to be a pleasure to serve MHSAA. MHSAA has become a prominent part of Lighthouse Sportswear's business, and I would

greatly appreciate it if you would continue to keep me informed of your intentions so that I may plan accordingly.

Please let me know if I can be of any assistance as you chart the course of MHSAA's merchandise program.

The parties came to an agreement for Lighthouse to continue the MHSAA business for 2010-11, but Cornish's email indicates his clear understanding that the agreement permitted MHSAA to decline the automatic renewal by July 31st of the preceding year. MHSAA clarified this understanding in a letter dated June 25, 2009, which indicates the parties discussed the amendment, and included the following revisions to paragraph 31 to memorialize what the parties' discussed:

(31) The term of this agreement shall be from August 1, 2009 to July 31, 2011. This agreement shall automatically be lengthened by one (1) year if neither party serves written notification by *July 31 of the preceding school year*, beginning during the 2009-10 school year. Lighthouse Sportswear, Inc. shall have the option in each year of this agreement to renew until the date of termination by, not later than March 31, meeting terms of any unsolicited offer considered more favorable by the MHSAA and in its possession prior to January 1.

a. The interpretation of this paragraph, by way of example, is as follows:

i. Neither the MHSAA nor Lighthouse Sportswear, Inc., may terminate the agreement for 2010-11 unless one notifies the other in writing by July 31, 2009 that it will not automatically renew the agreement.

ii. Furthermore, should the MHSAA receive an unsolicited offer prior to January 1, 2010 from another vendor to provide the services covered by this agreement for *2011-12*, Lighthouse Sportswear, Inc. shall have until March 31, 2010 to meet the terms of that offer. [Emphasis added.]

Cornish did not object to the change and, as stated, accepted that MHSAA chose not to automatically renew for 2010-11 based on its July 2009 letter. So, again, Cornish acted in a manner that evidenced his understanding that the agreement allowed cancellation of the automatic renewal by July 31 of the preceding year and made no argument that MHSAA's notification was untimely.

MHSAA sent Cornish a letter in July 2010, stating that it would not automatically renew for 2011-12. Again, Cornish did not assert that this was untimely and, thereafter, continued to negotiate with MHSAA for a long-term contract. MHSAA ultimately decided to contract with EA Graphics. However, as the trial court ruled, this is additional evidence that MHSAA did not breach the contract:

The fact remains, however, that not only did Plaintiff not challenge the timeliness of the July 12, 2010 letter, it also did not challenge the timeliness of the July 28, 2009 letter, and it further did not challenge the June 25, 2009 amendment to the

Royalty Agreement that changed the cut off date to July 31. A party cannot acquiesce to changes in a written agreement through their actions and then attempt more than a year later to argue that it never agreed to the changes. Indeed, this is precisely why a review of the business dealings of the parties to a contract was adopted as a means of determining the parties' intent—to prevent one party from blindsiding the other with a challenge months or years after the alleged breach.

Taken all together, it is clear that while the parties may have disagreed on the cut off date prior to and at the time of executing the Royalty Agreement, subsequently the cut off date was clarified by Defendant to be July 31 and Plaintiff acquiesced to this clarification. Accordingly, there is no genuine issue of material fact that Defendant did not breach the Automatic Renewal provision and Defendant is entitled to summary disposition pursuant to MCR 2.116(C)(10) as to this theory of breach of contract.

We hold that, for the reasons discussed, the trial court correctly ruled that there existed no genuine issue of material fact to present to a jury on this claim and that it correctly granted summary disposition to MHSAA.

We further hold that the trial court correctly ruled that the right to match language in the contract is unambiguous. The right-to-match provision in paragraph 31 states, "Lighthouse Sportswear, Inc., shall have the option in each year of this agreement to renew until the date of termination by, not later than March 31, meeting terms of any unsolicited offer considered more favorable by the MHSAA and in its possession prior to January 1." The trial court focused on the language "in each year of this agreement" and correctly ruled that once MHSAA stated, on July 12, 2010, that it would not renew the contract for the 2011-2012 school year, plaintiff had no right to match for that school year because the 2011-2012 school year was not a year of the agreement and it was past the date of termination. If a contract is unambiguous, extrinsic evidence may not vary its terms. *Zurich Ins Co v CCR and Co*, 226 Mich App 599, 610 576 NW2d 392 (1997). Accordingly, again, the trial court correctly granted summary disposition to MHSAA.

Lighthouse argues that the trial court erred by dismissing its claim that defendants EA Graphics and its president, Robert Artymovich, tortiously interfered with its contract with MHSAA.

"The elements of tortious interference with a business relationship are [1] the existence of a valid business relationship or expectancy, [2] knowledge of the relationship or expectancy on the part of the defendant, [3] an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and [4] resultant damage to the plaintiff." [*Dalley*, 287 Mich App at 323, quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699, 552 NW2d 919 (1996).]

Any interference must be improper, which means lacking justification. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003). “The ‘improper’ interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs’ contractual rights or business relationship.” *Id.*

Lighthouse maintains that summary disposition was premature because discovery was ongoing. “[A] motion under MCR 2.116(C)(10) is generally premature if discovery has not closed, unless there is no fair likelihood that further discovery would yield support for the nonmoving party’s position.” *Townsend v Chase Manhattan Mtg Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002). The non-moving party arguing that the motion is premature “must provide some independent evidence that a factual dispute exists.” *Michigan Nat Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993).

Lighthouse alleged that Artymovich told an MHSAA representative that Lighthouse was a fine vendor but did not have the same resources as EA Graphics, who could “take it to the next level.” Regardless whether more evidence could support this statement, the remark simply cannot be construed as an improper interference with a business expectancy. *Advocacy Org for Patients & Providers*, 257 Mich App at 383. A claim for tortious interference of a business expectancy may fail if the action was motivated by a legitimate business interest. *Wood v Herndon and Herndon Investigations, Inc*, 186 Mich App 495, 500-502; 465 NW2d 5 (1990). Here, no evidence shows that the alleged statements by Artymovich on behalf of EA Graphics were wrongful per se or done with malice, or that these statements were motivated by anything other than a legitimate business interest. They are merely statements about EA Graphics’s ability to provide better services for MHSAA.

Lighthouse claims that EA Graphics and Artymovich must have made improper representations to MHSAA about Lighthouse because MHSAA rejected defendants’ bid but then, a few months later, accepted it. Lighthouse has presented no factual support for its mere conjecture about improper representations. As pure speculation, with no factual basis, it cannot be said that further discovery would uncover factual support. *Townsend*, 254 Mich App at 140. Furthermore, this alleged conduct occurred after MHSAA terminated its contract with Lighthouse, a time when Lighthouse no longer had a business expectancy with which to interfere. *Dalley*, 287 Mich App at 323. Accordingly, the trial court correctly granted summary disposition to defendants because Lighthouse’s speculative accusations were insufficient to show that a genuine issue of material fact remained or that further discovery would uncover sufficient factual support. *Michigan Nat Bank*, 198 Mich App at 241.

The trial court also correctly granted summary disposition on Lighthouse’s claim that EA Graphics and Artymovich tortiously interfered with a business expectancy by hiring a third party to call Lighthouse to request allegedly proprietary information. To establish a claim of tortious interference with a business expectancy, a plaintiff must show that the action caused a breach of the business expectancy and damages. *Dalley*, 287 Mich App at 323. Lighthouse’s claim necessarily fails because the person who called Lighthouse gained no information that could have damaged the company.

Lighthouse asserts that MHSAA, EA Graphics and Artymovich misappropriated its sales data, which it claims was its trade secret. We hold that the trial court correctly ruled that the sales data is not a trade secret under the Michigan Uniform Trade Secrets Act (MUTSA), MCL 445.1901 *et seq.*

MUTSA allows for injunctions and damages on the basis of the misappropriation of trade secrets. MCL 445.1904-.1905. “Misappropriation” is defined as:

(i) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.

(ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:

(A) Used improper means to acquire knowledge of the trade secret.

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired it under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use. [MCL 445.1902(b).]

“Trade secret” is defined as follows:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [MCL 445.1902(d).]

Lighthouse alleged that defendants misappropriated its sales information, which it had compiled from various MHSAA events. However, as the trial court ruled, information relating to sales of MHSAA merchandise at MHSAA events does not fall within the definition of a “trade secret.” Lighthouse was required under the contract to give sales data to MHSAA for MHSAA-licensed merchandise. Thus, the information was not a trade secret belonging to Lighthouse, and it was not improper for MHSAA to discuss sales information of MHSAA merchandise with other potential vendors, including EA Graphics. Thus, even viewing the allegations in a light most favorable to Lighthouse, the trial court correctly dismissed its claim pursuant to MCR 2.116(C)(8).

Affirmed.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell