STATE OF MICHIGAN

COURT OF APPEALS

BURNSIDE INDUSTRIES, LLC,

Plaintiff-Appellant,

v

CB RICHARD ELLIS, INC., and CB RICHARD ELLIS-GRAND RAPIDS, LLC,

Defendants-Appellees.

UNPUBLISHED
August 22, 2006

No. 268343
Muskegon Circuit Court
LC No. 04-043523-CZ

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Plaintiff Burnside Industries, LLC, appeals as of right an order of the trial court granting summary disposition in favor of defendant CB Richard Ellis-Grand Rapids, LLC ("Ellis-GR") in this negligent referral claim involving a real estate and equipment financing loan for plaintiff's business. We affirm.

I

This case arises from a failed commercial refinancing transaction, in which a former employee of defendant CB Richard Ellis, Inc.[1] ("Ellis"), allegedly absconded with a $40,000 loan commitment fee paid by plaintiff for refinancing that never occurred. Although the employee no longer worked for Ellis at the time of the transaction, and although the transaction was handled by The Charter Investment Group, Ltd. ("Charter"),[2] plaintiff's refinancing consultant, plaintiff filed this action against defendants alleging they were liable for plaintiff's losses because an employee of Ellis-GR negligently referred plaintiff's consultant to the dishonest former employee.

[1] CB Richard Ellis is a Delaware corporation headquartered in Los Angeles. Ellis-GR is an affiliate of the Los Angeles based company, but is a separate entity. Ellis was subsequently dismissed as a party and is not involved in this appeal.

[2] According to its principal who handled plaintiff's account, John Kerschen, The Charter Group is a small and middle market merger acquisition firm that helps clients buy and sell businesses, and help certain clients raise equity or debt capital.

The uncontroverted facts of this case were set forth in the trial court's opinion and order as follows:[3]

> Plaintiff originally retained The Charter Investment Group in an agreement dated March 31, 2003 to assist plaintiff in refinancing plaintiff's debt to GMAC. Charter Investment referred plaintiff to Bob Horn, Vice President and Industrial Sales Advisor at Ellis-GR. In early April 2003, Horn referred and recommended plaintiff to Ron Paterson as someone who was capable of assisting plaintiff with the refinancing of its existing debt. However, defendant had filed a civil lawsuit against Paterson, its former employee, for embezzlement in March [] 2003. Paterson had formed his own company, Integrated Finance Group, after leaving the employment of defendant. On March 4, 2003, Horn had received an Ellis company-wide email which advised him that Ron Paterson was no longer employed by defendant, and that defendant had discontinued the operations of the CBRE Lease Finance Group. The email also stated: "Mr. Paterson is not authorized to conduct any business on behalf of CB Richard Ellis, nor with any of our clients using our name, and we will not refer any future business to him [emphasis added].[4] If you are aware of any currently pending transactions where Mr. Paterson is seeking to negotiate lease/finance terms for clients, please inform Greg Caxon in Phoenix of such transactions . . .". [sic] In spite of the receipt of this email, and being told by the managing director of Ellis-GR to follow the directives of the email, Horn continued to attempt financing through Paterson's company, Integrated Finance Group, for plaintiff, and Horn never contacted Greg Caxon. The record further establishes that Horn had no knowledge of any prior criminal activities, or any criminal propensities, on the part of Paterson, or defendant's civil lawsuit against Paterson.
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> In May 2003, Integrated Finance Group sent a second loan proposal to plaintiff in an amount of up to $3,500,000[] and required a $40,000[] commitment fee to Paterson. On May 19, 2003, plaintiff sent Paterson a signed second loan proposal and a check for $40,000[]. After numerous delays, plaintiff failed to obtain the promised funding under the second loan proposal, leading to a claimed loss by plaintiff in excess of $120,000[].

The court noted that the central issue was whether defendants owed plaintiff a duty. The court concluded that no duty was owed because the email and directive to Horn were internal policies of defendants, which could not be used to establish a legal duty in a negligence claim. The court granted Ellis-GR's motion for summary disposition and subsequently denied plaintiff's motion to add Robert Horn as a defendant and to amend the complaint to add a claim of liability based on agency.

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[3] The parties do not challenge these facts on appeal.

[4] Emphasis added by the trial court.

II

This court reviews de novo the trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion under MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions, admissions or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. *Id*.; *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

"The grant or denial of leave to amend is within the sole discretion of the trial court." *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493; 618 NW2d 1 (2000). "[R]eversal is only appropriate when the trial court abuses that discretion." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Generally, a court should freely grant leave to amend when justice so requires. *Knauff, supra*. MCR 2.116(I)(5) provides that when the ground asserted in a motion for summary disposition is based on subrule (C)(10), as here, "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118 unless the evidence then before the court shows that amendment would not be justified." An opportunity to amend would not be justified if it would be futile. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004); *Weymers, supra* at 658.

III

Plaintiff first argues that the trial court erred in finding that Ellis-GR owed no duty to plaintiff for a negligent referral in violation of its own directive. We disagree.

Plaintiff contends that Ellis-GR owed plaintiff a duty to protect plaintiff from an unreasonable risk of injury given a company-wide email informing Ellis employees that Paterson was no longer employed with Ellis, that Ellis had discontinued the operations of CBRE Lease Finance Group, where Paterson had been employed, and that no future business referrals would be made to him. We find no basis for imposing a duty on Ellis-GR to protect plaintiff on the basis of the internal company email.

As a general rule, internal company policies may not be used to establish a legal duty in a negligence claim. *Zdrojewski v Murphy*, 254 Mich App 50, 62; 657 NW2d 721 (2002). The rationale for this rule is that imposing a duty on companies that, by means of work rules or policies, undertake to protect their employees or customers would encourage companies to abandon all efforts that could benefit such employees or customers, in order to avoid future liability. *Premo v General Motors Corp*, 210 Mich App 121, 124; 533 NW2d 332 (1995); see also *Buczkowski v McKay*, 441 Mich 96, 99 n 1; 490 NW2d 330 (1992). Unless compliance with the policies or rules relates to an underlying law or regulation, no duty attaches for a violation of an internal policy. *Id*. at 106; *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 767; 431 NW2d 90 (1988).

In this case, the internal email distributed by Ellis to its affiliate Ellis-GR stated in relevant part:

> The purpose of this message is to inform you that Ron Paterson is no longer employed by CB Richard Ellis and that we have discontinued the operations of the CBRE Lease Finance Group. Mr. Paterson is not authorized to conduct any business on behalf of CB Richard Ellis, nor with any of our clients using our name, and we will not refer any future business to him. If you are aware of any currently pending transactions where Mr. Paterson is seeking to negotiate lease/finance terms for clients, please inform Greg Coxon in Phoenix of such transactions, at [telephone number]. Should you have any questions regarding this matter, please contact Ellis Reiter in the legal department in Los Angeles at [telephone number]."

Plaintiff makes no claim that the email is based on an underlying law or regulation, and instead relies on the email merely to establish foreseeability, as one factor supporting the recognition of a duty in this case. Further, plaintiff asserts that the above-noted public policy considerations concerning company policies are not present in this case because plaintiff claims no duty to the general public. Plaintiff also attempts to exempt the email from the no-duty rule on the basis that the email is a "directive" rather than a policy.

We find no basis for disregarding the general "no duty" rule concerning an internal company policy with regard to the email. Whether the email is viewed as a "directive" or a "policy," it was issued to avoid injury to Ellis customers and thereby to the company. The email imposes no legal duty on Horn or Ellis that runs through Charter to protect its client, plaintiff.

Plaintiff nevertheless argues that a duty should be found based on general considerations because Ellis-GR owed plaintiff a duty or legal obligation to refrain from actions that could be reasonably foreseen to result in plaintiff's injury or damage. Plaintiff contends that a duty should be imposed on the basis of the foreseeability of risk, as well as other factors: the existence of the relationship between the parties, the degree of certainty of injury, the closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach. *Buczkowski, supra* at 101 n 4.

Questions of duty are for the court to decide as a matter of law. *Premo, supra* at 124. "Duty involves the question whether the defendant is under any obligation for the benefit of the particular plaintiff and concerns the problem of the relation between individuals that imposes upon one a legal obligation for the benefit of the other. It is an expression of the sum total of those considerations of policy which leads the law to say that the plaintiff is entitled to protection." *Id*. (citations omitted).

In *Premo*, this Court found that General Motors owed no duty to the plaintiff, who was injured in an automobile accident caused by an off-duty General Motors employee who allegedly was intoxicated and had earlier consumed alcohol at work, and drove away, in violation of General Motors' policy of preventing intoxicated employees from leaving the plant in their automobiles. *Id*. at 122-123. The Court found no assumption of duty because the relationship between General Motors and the plaintiff was too remote to obligate General Motors to protect the plaintiff. *Id*. at 124-125. The court noted that imposing liability would encourage the company to forego beneficial policies to avoid future liability. *Id*. at 124.

Here, as in *Premo*, the relationship between Ellis-GR and plaintiff was too remote to impose an obligation on Ellis-GR to protect plaintiff from the refinancing offer arranged through Charter[5] directly between plaintiff and Paterson. Despite Horn's apparent involvement in the initial contacts and proposal, it is undisputed that the transaction at issue was pursued by Charter and its principal John Kerschen, and that plaintiff was Charter's customer, not Ellis' customer. We find no error in the trial court's grant of summary disposition in favor of defendant.

IV

Plaintiff next argues that the trial court erred in denying plaintiff's motion to file a second amended complaint on the ground that defendants were not agents or subagents of plaintiff. We disagree.

Plaintiff contends that Charter, as an agent with whom plaintiff had a direct contractual relationship, undertook a duty to find financing for plaintiff and that Charter delegated that duty to defendant and Horn, who then became subagents of Charter and therefore owed plaintiff the same duty as Charter. Accordingly, plaintiff contends that it was entitled to amend its complaint to add Horn as a party defendant on an agency theory, even though Horn and defendant were never hired to assist Charter, because they acted directly and strictly for the "benefit" of plaintiff. Plaintiff asserts that there is no Michigan authority on point,[6] but relies on general authority, citing several treatises.

Defendant argues that plaintiff's agency theory is unsupported by the facts because plaintiff's contract with Charter specifically prohibited the appointment of a subagent such as that alleged, because Charter was engaged as plaintiff's exclusive representative to pursue refinancing. Further, even if somehow defendant and Horn became an agent of Charter, no agency relationship existed with plaintiff.

Contrary to plaintiff's argument, we disagree that a disputed issue of fact exists concerning agency that entitled plaintiff to maintain an action against Horn. The trial court reasoned that, under general agency principles and Michigan law, there was no basis for liability of defendant and Horn because there was no evidence in the record "to suggest that either plaintiff or Charter Group [sic] had any right to control the conduct and activities of either [Ellis-GR] or Robert Horn." We concur in the court's conclusion. Further, the facts do not support plaintiff's subagent theory because there is no indication that Charter was empowered by plaintiff to appoint a subagent or that defendant or Horn acted as a subagent of plaintiff.

"The test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). In this case, Kerschen acted on behalf of plaintiff to secure refinancing for plaintiff, and,

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[5] Plaintiff released Charter from liability in exchange for its cooperation in this action against defendant.

[6] We note, however, that in its opinion and order, the trial court cited *Hoag v Graves*, 81 Mich 628, 633; 46 NW 109 (1890) for the general rules concerning liability of a subagent.

in doing so, he contacted a number of lenders and other sources of funding. That these contacts resulted in information or referrals ultimately acted on by plaintiff does not transform the referral sources, such as Horn, into agents or subagents of plaintiff. To impose liability on Horn and defendant under the attenuated relationship in this case would undermine the "right of control" principles fundamental to an agency relationship.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Donald S. Owens