STATE OF MICHIGAN

COURT OF APPEALS

ASHLEY HEALTHCARE CENTER, LLC, Plaintiff/Counterdefendant-Appellant,	UNPUBLISHED March 21, 2024
v	No. 364229 Gratiot Circuit Court
MATTHEW BRZAK and KALI FELDKAMP, Defendants/Counterplaintiffs-Appellees.	LC No. 21-000466-CH

Before: M. J. KELLY, P.J., and BOONSTRA and CAMERON, JJ.

PER CURIAM.

Plaintiff/counterdefendant ("plaintiff"), appeals as of right the order which: (1) granted summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in favor of defendants/counterplaintiffs ("defendants"); (2) dismissed defendants' counterclaim and denied plaintiff's motion for summary disposition as to defendants' counterclaim; and (3) denied plaintiff's motion to allow a supplemental response to plaintiff's earlier discovery responses and to reopen discovery. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Plaintiff is a skilled nursing home, owned and operated by Pioneer Health Care Management ("Pioneer"). Defendant Matthew Brzak was plaintiff's administrator and defendant Kali Feldkamp was its director of nursing. Fahim Uddin owns and operates Pioneer.

This case involves the transfer of ownership after plaintiff's previous owner decided to sell the facility. To complete the transition the parties involved executed several contracts. Pioneer entered into an "Operations Transfer Agreement" ("OTA") which explained the transition of

ownership.[1] There was also an agreement to purchase plaintiff between third-party investors. Defendants' employment would not continue into the new administration, and each signed noncompete agreements upon termination.

Before the purchase was complete, Uddin had several meetings with plaintiff's staff, in which he relayed the terms of the transfer, including the requirement that staff would have to reapply for their positions and that there would be a significant reduction in healthcare benefits. Uddin also met with the residents' families. Many staff did not seek reemployment at the time of sale and several residents left to seek care at other facilities.

Plaintiff filed a complaint alleging breach of contract and tortious interference.[2] Defendants filed a counterclaim alleging defamation by plaintiff. Defendants moved for summary disposition of the complaint and plaintiff moved for summary disposition of the counterclaim. Plaintiff also moved to reopen discovery on the basis of newly discovered evidence. Thereafter, defendants voluntarily dismissed the counterclaim. Because defendants dismissed the counterclaim, the trial court denied plaintiff's motion for summary disposition as moot. It also denied plaintiff's motion to reopen discovery. The trial court did, however, grant defendants' motion for summary disposition under MCR 2.116(C)(10). This appeal followed.

II. DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Plaintiff argues the trial court erred in granting defendants' (C)(10) motion for summary disposition of its breach-of-contract and tortious interference claims. Plaintiff specifically challenges the trial court's finding that its response to defendants' motion for summary disposition impermissibly relied on hearsay evidence. We agree, in part, and disagree, in part.

A. STANDARD OF REVIEW

Motions for summary disposition are reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Id*. at 120.

> In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. (citations omitted)]

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[1] The OTA stated it was "by and between ORCHARD LAKE INVESTMENTS ASSOCIATES, L.L.C., a Michigan limited liability company ('Seller'), and ASHLEY HEALTH CARE CENTER, LLC, a Michigan limited liability company ('New Operator')."

[2] Although not relevant to this appeal, plaintiff also requested injunctive relief relevant to defendants' alleged actions.

"[T]he moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If this is satisfied, "[t]he burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id*. But:

> Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Id*. at 362-363 (citations omitted).]

The evidence presented by the parties in support or opposition to a motion for summary disposition under MCR 2.116(C)(10) "shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

B. LAW AND ANALYSIS

Plaintiff's complaint alleged breach of contract and tortious interference with a contractual relationship and defendants moved for summary disposition of each. We address each allegation separately.

1. BREACH OF CONTRACT

To prove breach of contract, a plaintiff must demonstrate: "(1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 100; 878 NW2d 816 (2016) (citation omitted). Plaintiff's breach-of-contract claim was premised on the following identical provisions of defendants' respective noncompete agreements:

> 2. **Solicitation of Business.** During the Restrictive Period, the Covenantor shall not solicit or assist any other person to solicit any business from any present or past resident of the Facility; or advise any present or future resident of the Facility to terminate its dealings with the Facility and New Operator; or commit any other act or assist others to commit any act which might injure the Facility's business. This provision shall not be construed to prohibit doing business with past, present[,] or future residents of the Facility, provided that those residents are not actively solicited by Covenantor.
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> 3. **Employees.** During the Restrictive Period, the Covenantor shall not directly or indirectly (*i*) encourage any employee of the Facility to leave the employ of the Facilityor [sic] (*ii*) hire any employee who has left the employment of the Facility if such hiring is proposed to occur within one year after termination of such employee's employment with the Facility unless such termination is by the employer.

Plaintiff alleged defendants breached these provisions by telling residents to move to other facilities and by encouraging staff to "quit their positions and move to competing companies."

Defendants moved for summary disposition, arguing, in part, that there was no genuine question of fact that they did not breach their noncompete agreements. In support of this assertion, defendants attached their sworn affidavits in which they denied breaching their noncompete agreements. Each defendant specifically denied they encouraged residents and staff to leave the facility after the transfer to Pioneer. Given this evidence, defendants satisfied their preliminary burden of proof and the burden then shifted to plaintiff to show a genuine question of fact whether defendants breached the noncompete agreements.

Plaintiff opposed defendants' motion for summary disposition, arguing there was plenty of evidence demonstrating that defendants encouraged staff and residents to leave the facility. Among this evidence was a voicemail from a person identified as "Anna," an e-mail exchange, and text messages from several third parties indicating defendants were advocating for people to leave the facility (hereinafter the "third-party statements"). According to plaintiff, this evidence showed defendants "were actively trying to stop the deal from [c]losing and trying to move as many patients as possible out of the [f]acility in the event the [c]losing was completed."

Again, only admissible evidence may be considered in relation to a motion for summary disposition. MCR 2.116(G)(6). In granting the motion for summary disposition, the trial court concluded the third-party statements could not be considered because they were inadmissible hearsay. Hearsay is an out-of-court statement that "a party offers in evidence to prove the truth of the matter asserted[.]" MRE 801(c). Unless one of the exceptions to the hearsay rule applies, hearsay is generally inadmissible. MRE 802. The third-party statements offered by plaintiff in opposition to defendants' motion for summary disposition were plainly hearsay, because they were made out of court and were offered to show the truth of the matter asserted—that defendants encouraged staff or residents to leave the facility.

On appeal, plaintiff points to several categories of out-of-court statements which plaintiff believes are not hearsay, and therefore admissible. Plaintiff contends the third-party statements fall into these categories. We reject this argument, not only because plaintiff's argument relies on the "Michigan Courtroom Evidence Annotated" which is not authoritative, but also because plaintiff's conclusory assertion the third-party statements fall into these categories is undeveloped and this Court will not develop the argument for plaintiff on appeal. See *MOSES Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.").

The only remaining admissible evidence that plaintiff cited in opposition to defendants' motion for summary disposition was Uddin's deposition testimony. Uddin testified that the third-party statements, along with his interactions with others, led him to conclude that defendants had encouraged residents and staff to leave the facility. Deposition testimony is usually admissible in opposition to a motion for summary disposition. MCR 2.116(G)(6). But in this instance, Uddin testified that the third-party statements led him to believe defendants were on a mission to move residents and staff from the facility. The third-party statements were inadmissible hearsay, and, therefore, could not be considered in the context of defendants' motion for summary disposition. Moreover, plaintiff's burden at this point was to present "specific facts" demonstrating a genuine

question of fact about defendants' alleged actions. *Quinto*, 451 Mich at 362. Plaintiff's general belief about defendants' actions, formed on the basis of the third-party statements, failed to meet the specificity requirement.

Defendants satisfied their preliminary burden demonstrating they did not breach their noncompete agreements. Therefore, summary disposition of the breach-of-contract claim was appropriate.

2. TORTIOUS INTERFERENCE

Plaintiff's complaint also alleged tortious interference of a contract against defendants. A claim of tortious interference of a contract requires a showing of: "(1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant." *Badiee v Brighton Area Sch*, 265 Mich App 343, 366; 695 NW2d 521 (2005) (quotation marks and citation omitted). "[O]ne who alleges tortious interference with a contractual or business relationship 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." *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002) (citation omitted, alteration in original).

Defendants moved for summary disposition of the tortious interference claim under MCR 2.116(C)(10). Their argument in support of their motion relied on just one sentence in which defendants asserted that plaintiff "does not allege any specificity with respect to any alleged breach" and has "produced no evidence of breach or damages." Defendants supported these bare assertions by directing the trial court to examine four affidavits that they had attached to their motion to dismiss. The trial court could have rejected defendants' cursory argument as woefully inadequate. But, the trial court considered the exhibits and, in its oral ruling, concluded that the affidavits by defendants were adequate to meet their initial burden that they had not encouraged families or patients to leave plaintiff's facility. The trial court thus granted defendants' motion for summary disposition. The trial court did not err in so ruling because plaintiff's response to the motion for summary disposition offered no documentary evidence showing defendants' actions were per se wrongful or that they "invad[ed] the contractual rights or business relationship of another." *CMI Int'l, Inc*, 251 Mich App at 131.

III. DEFENDANTS' COUNTERCLAIM

Plaintiff argues that the trial court abused its discretion when it granted defendants' motion to withdraw their counterclaim. According to plaintiff, the trial court should have imposed sanctions against defendants for filing a purportedly baseless defamation counterclaim. We disagree.

A. STANDARD OF REVIEW

"The grant or denial of voluntary dismissal is within the discretion of the trial court." *Newman v Real Time Resolutions, Inc*, 342 Mich App 405, 411; 994 NW2d 852 (2022). Similarly, a trial court's decision whether to impose sanctions is reviewed for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 450; 540 NW2d 696 (1995). "A trial

court abuses its discretion when its decision is outside the range of reasonable and principled outcomes." *Newman*, 342 Mich App at 411 (quotation marks and citation omitted).

B. LAW AND ANALYSIS

The following authorities are relevant to whether the trial court erred in granting dismissal of defendants' counterclaim. For instance, MCR 2.504(A) concerns a plaintiff's voluntary dismissal. It states:

> (A) Voluntary Dismissal; Effect.
>
> (1) By Plaintiff; by Stipulation. Subject to the provisions of MCR 2.420 and MCR 3.501(E), an action may be dismissed by the plaintiff without an order of the court and on the payment of costs
>
> (a) by filing a notice of dismissal before service by the adverse party of an answer or of a motion under MCR 2.116, whichever first occurs; or
>
> (b) by filing a stipulation of dismissal signed by all the parties.
>
> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a dismissal under subrule (A)(1)(a) operates as an adjudication on the merits when filed by a plaintiff who has previously dismissed an action in any court based on or including the same claim.
>
> (2) By Order of Court. Except as provided in subrule (A)(1), an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper.
>
> (a) If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the court shall not dismiss the action over the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.
>
> (b) Unless the order specifies otherwise, a dismissal under subrule (A)(2) is without prejudice. [MCR 2.504(A).]

MCR 2.504(C), meanwhile, pertains to the voluntary dismissal of a counterclaim, stating, in part: "A voluntary dismissal by the claimant alone, pursuant to subrule (A)(1), must be made before service by the adverse party of a responsive pleading or a motion under MCR 2.116, or, if no pleading or motion is filed, before the introduction of evidence at the trial."

Defendants' counterclaim alleged defamation against plaintiff for purported false statements by plaintiff's agent, Uddin. Plaintiff moved for summary disposition of the counterclaim under MCR 2.116(C)(10). Defendants later agreed to dismiss their counterclaim because, since filing, they had not suffered any economic damages from the statements. The trial court then entered an order which dismissed (1) defendants' counterclaim, and (2) plaintiff's motion for summary disposition.

On appeal, plaintiff incorrectly argues the trial court erred in granting dismissal of the counterclaim, because "MCR 2.504 does not permit a party to unilaterally dismiss a claim or counter-claim [sic] once the opposing party has filed an answer." But, the rule prohibiting dismissal after a party has filed an answer pertains to circumstances where the dismissal is "without an order of the court." MCR 2.504(A)(1) and (C). Here, defendants sought a dismissal *with* an order of the court. Dismissals by order of the court are governed by MCR 2.504(A)(2) which does not prohibit dismissal where there was a responsive pleading. It was therefore not an error to grant defendants' request for a dismissal.

Plaintiff next claims that, in dismissing defendants' counterclaim, the trial court should have imposed sanctions against defendants. MCR 2.504(A)(2) requires that voluntary dismissals be "on terms and conditions the court deems proper." Plaintiff apparently believes sanctions were among the "terms and conditions" necessary to grant dismissal. The imposition of sanctions is discretionary in nature. *Richardson*, 213 Mich App at 450. While plaintiff generally argues the trial court's rulings were favorable to defendants, but unfavorable to plaintiff, plaintiff provides no clear argument explaining why sanctions were necessary in this instance or why the trial court abused its discretion in declining to impose them. "It is not enough for an appellant in [their] brief simply to assert an error and then leave it up to this Court to unravel and elaborate for [them their] arguments, and then search for authority either to sustain or reject [their] position." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008) (ellipses omitted). Thus, this argument is waived for our review.

IV. MOTION TO REOPEN DISCOVERY

Plaintiff argues that the trial court abused its discretion when it denied its motion for leave to supplement its previous discovery response and to reopen discovery because plaintiff only requested a short extension in order to provide documentary evidence of its damages and to depose two additional witnesses. We disagree.

A. STANDARD OF REVIEW

This Court reviews a trial court's decision to deny a motion to permit discovery after the passage of a discovery deadline for an abuse of discretion. See *Kemerko Clawson LLC v RxIV, Inc*, 269 Mich App 347, 349-351; 711 NW2d 801 (2005).

B. LAW AND ANALYSIS

On October 20, 2022, plaintiff moved for leave to file a supplemental response to its earlier discovery responses and to reopen discovery due to newly discovered evidence after the parties' September 2022 depositions. During defendants' respective depositions, plaintiff learned (1) the "Anna" who left a voicemail message for plaintiff regarding defendants' attempts to transfer patients to a different facility was Annette, the former director of nursing of the subject facility and the current director of nursing at another facility, and (2) James Mayhew, the son a facility resident, heard that defendants held a meeting with the patients during which they made derogatory comments regarding Uddin's new ownership of plaintiff. Plaintiff further discovered Jenna O'Dell, Annette's daughter, was the admissions coordinator at another facility and handled the patient referrals from plaintiff's facility. Plaintiff also advanced, albeit incorrectly, that, because

the trial court previously granted defendants' motion for a protective order, plaintiff was barred from presenting any additional evidence if it was not introduced before September 30, 2022. In its motion, plaintiff specifically requested the admission of certain invoices from agencies that provided services to plaintiff after closing, in addition to the opportunity to acquire the deposition testimonies of Jenna and James.

The trial court later entered an order addressing plaintiff's untimely discovery requests, ruling (1) plaintiff was barred from producing any further documents regarding any of the claims in its complaint that would have been included in the scope of defendants' request for discovery, and (2) plaintiff was prohibited from introducing into evidence, at any future stage of the litigation, any document that would have been responsive to defendants' discovery requests which was not previously produced in response thereto. During the oral opinion hearing, the trial court clarified the aforementioned order and provided the following:

> The spirit of this Court's order was not that the parties could not submit properly supported and verified affidavits in support of their respective motions, but that if a document forming the basis for this lawsuit was requested and not produced, which was not otherwise subject to a privilege, that document could not later be used in the prosecution of this lawsuit by plaintiff. Affidavits from witnesses created to support a properly founded motion for summary disposition does not fall into the category of documents that would have been requested, but not produced in discovery. And after review of defendants' interrogatories and production of document requests this Court does not see where a specific request was made for affidavits from witnesses who might provide testimony to support a properly founded motion for summary disposition.

The court further explained that its previous discovery orders did not bar plaintiff from presenting properly verified affidavits from witnesses to support its complaint and allegations. But, it was plaintiff that neglected to provide an adequate explanation as to why it waited until the end of the discovery period "to obtain even the most basic discovery from named defendants." The trial court formally denied plaintiff's motion for leave to supplement its previous discovery response and to reopen discovery in an order following the hearing.

Plaintiff contends the trial court improperly denied its discovery motion because it only requested a short extension to provide some additional evidence. But, the trial court's statements during the oral opinion hearing, as detailed above, clearly establish that plaintiff was still permitted to seek affidavits from the two people it desired to depose, Jenna and James. Furthermore, while plaintiff advances that it was only able to identify Annette, Jenna, and James *after* defendants' September 2022 depositions, the evidentiary record indicates otherwise. First, the voicemail transcript provided by plaintiff from an "Anna," listed her workplace in the "from" description with the person's phone number, and defendant Brzak's September 2, 2021 affidavit stated, "The transcribed voicemail that Mr. Uddin's counsel is using in the suit is from a former Director of Nursing Annette O'Dell (the current Director of Nursing at the Chesaning Nursing home in Chesaning, MI)." Second, James's desire to transfer his mother, Clarabelle, from plaintiff's facility was extensively detailed in defendant Feldkamp's September 2, 2021 affidavit, and Clarabelle was listed in plaintiff's own discharge documentation. Accordingly, plaintiff was presented with the opportunity to identify and contact Annette, James, and Jenna, and plaintiff

failed to adequately explain why it neglected to do so. Plaintiff further requested the opportunity to provide invoices of its alleged damages related to its use of nursing agencies to staff the facility after the operations transfer. However, it is unclear why plaintiff was previously unable to provide the aforementioned documents, as the staffing agency was used immediately after closing.

Plaintiff did not have a bona fide reason for its failure to comply with the discovery deadline, and granting the motion would have prejudiced defendants because plaintiff's request to seek further discovery occurred more than a year after it filed its initial complaint, and the parties already filed for summary disposition. Furthermore, plaintiff was previously penalized for its failure to comply with discovery orders, and was given the opportunity to amend its pleadings during the initial stages of the lower court proceedings. Accordingly, the trial court was well within the range of reasonable and principled outcomes when it refused to permit further discovery.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark T. Boonstra
/s/ Thomas C. Cameron