STATE OF MICHIGAN

COURT OF APPEALS

ATCO INDUSTRIES, INC.,

Plaintiff/Counterdefendant-Appellant,

v

SENTEK CORPORATION,

Defendant-Appellee,

and

ALPS AUTOMOTIVE, INC., SISINIO YAP and ALICIA LINAAC,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Not Participating,

and

SARKIS ATIKIAN and ARLENE ATIKIAN,

Third-Party Defendants-Not Participating.

UNPUBLISHED
July 10, 2003

Nos. 232055; 235398
Oakland Circuit Court
LC No. 99-016847-CK

Before: White, P.J., and Kelly and Gribbs*, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right an order granting Sentek Corporation's (Sentek) motion for summary disposition, and an order granting Sentek's motion for mediation sanctions. We affirm.

I. Basic Facts and Procedural History

Plaintiff, owned, controlled, and operated by Sarkis Atikian and Arlene Atikian, is in the business of providing quality control, rework, packaging, assembly, and other services. Plaintiff

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

was retained by ALPS Automotive, Inc., (ALPS) to provide employees for such services. Subsequently, ALPS contacted Sentek to provide a price quotation regarding the services provided by plaintiff. ALPS eventually terminated its relationship with plaintiff and retained Sentek to supply such services. Additionally, ALPS hired Alicia Linaac and Sisinio Yap, two of plaintiff's employees, to work directly for ALPS.

Plaintiff filed a complaint against ALPS, Linaac, Yap, and Sentek. Regarding Sentek, plaintiff sought damages on four distinct theories: tortious interference, inducement of a breach of fiduciary duty, unfair competition, and civil conspiracy. The case proceeded to mediation and was evaluated at $340,000; $10,000 of which was to be paid by Sentek. Although Sentek accepted the mediation evaluation, plaintiff did not respond, which resulted in an automatic rejection of the mediation evaluation.

Sentek moved for summary disposition of all claims against it, and the trial court granted the motion. Sentek thereafter moved for mediation evaluation sanctions, but the trial court denied the motion as premature. The trial court also denied Sentek's motion for reconsideration concluding that it was "appropriate to decide the issue of mediation sanctions after the matter is finally resolved."

Eventually, plaintiff settled with ALPS, Linaac, and Yap for $525,000 and the trial court entered an order of dismissal with prejudice. The terms and amount of the settlement were not included in the order of dismissal. After entry of the order of dismissal, Sentek again moved for mediation sanctions. Sentek argued that it had not been involved in any settlement with plaintiff and that it was previously dismissed from the case based on its motion for summary disposition. Plaintiff countered that it was inappropriate to award Sentek anything based on the circumstances of the case. Specifically, plaintiff argued that because the case involved multiple parties, the court was required to look at the aggregate settlement, which exceeded the combined mediation award, and thus mediation sanctions were inappropriate. The trial court determined that, throughout the entire action, defendants acted separately in filing separate answers, separate motions for summary disposition, and separate mediation summaries were prepared. The trial court further indicated that the mediation panel treated defendants as separate entities and made separate evaluations. The trial court concluded that Sentek was entitled to mediation sanctions based on its own verdict of zero dollars, and granted Sentek's motion for mediation sanctions.

II. Summary Disposition

In Docket No. 235398, plaintiff contends that the trial court erroneously granted Sentek's motion for summary disposition on plaintiff's claims of tortious interference, civil conspiracy and unfair competition. "A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal." *Liberty Mutual Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 40; 638 NW2d 155 (2001). "A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim." *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). "Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed 'in the light most favorable to the party opposing the motion.'" *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of

material fact, and the moving party is entitled to judgment as a matter of law." *Universal Underwriters*, *supra* at 720.

A. Tortious Interference

Plaintiff argues that the trial court erroneously granted Sentek's motion for summary disposition because a genuine issue of material fact was presented on its claim for tortious interference with a business relationship or expectancy. We disagree.

"The elements of tortious interference with a business relationship are 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. . . ." *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). In the instant case, the third element is contested.

John Keegan, the president of ALPS and Melanie Dolan, a buyer for ALPS, both testified that ALPS was unhappy with plaintiff's management and that a decision had been made to replace plaintiff. Keegan found that plaintiff read the market wrong and did not follow targets set up by him. Further, Sarkis Atikian testified that he had no personal or other knowledge of any Sentek representative saying anything to any person working at the ALPS facility regarding plaintiff. Finally, plaintiff gave its employees at the ALPS facility three options after plaintiff was informed that it was being terminated by ALPS, one of which was to end the employment relationship with plaintiff. Thus, it was plaintiff that provided its employees with the option of leaving its employment. Arlene Atikian agreed that there was no contract between plaintiff and its employees at the ALPS facility, and indicated that those employees were free to discontinue their employment with plaintiff in order to work somewhere else. Because plaintiff failed to present any evidence that Sentek engaged in an intentional interference with the already strained relationship between ALPS and plaintiff, we find that the trial court properly granted summary disposition of plaintiff's claim against Sentek for tortious interference with a business relationship.

B. Civil Conspiracy

Next, plaintiff contends that the trial court erroneously granted Sentek's motion for summary disposition regarding plaintiff's claim for civil conspiracy. We disagree.

"A civil conspiracy is a combination of two or more persons, by some concerted action to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). "In order to prove a claim of concert of action, the plaintiff must show that 'all defendants acted tortiously, pursuant to a common design . . . .'" *Jodway v Kennametal, Inc*, 207 Mich App 622, 631; 525 NW2d 883 (1994) (citation omitted). Further, "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Early Detection Center, PC v Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

Plaintiff alleged that Sentek, along with ALPS, Sisinio Yap, and Alicia Linaac, jointly, intentionally, and wrongfully devised a plan or scheme which involved the replacement of

plaintiff by Sentek by destroying the relationship existing between plaintiff and ALPS for the profit and benefit of defendants. On appeal, plaintiff contends that it is "Sentek's conduct in terms of helping [ALPS] achieve its tortious ends that subjects Sentek to liability for conspiracy, not exclusively Sentek's own tortious acts." However, plaintiff failed to demonstrate that Sentek, by some concerted action, either accomplished a criminal or unlawful purpose or accomplished a lawful purpose by criminal or unlawful means. Further, plaintiff did not have a viable claim for civil conspiracy as plaintiff has failed to prove a separate, actionable tort exists against Sentek in the form of tortious interference with a business relationship or unfair competition. Accordingly, summary disposition was proper in regard to plaintiff's claim for civil conspiracy.

C. Unfair Competition

Plaintiff also contends that the trial court erroneously granted Sentek's motion for summary disposition regarding plaintiff's claim for unfair competition. We disagree.

> Michigan's common law of unfair competition prohibits unfair and unethical trade practices that are harmful to one's competitors or to the general public. *See, e.g., Clairol, Inc v Boston Discount Center of Berkley, Inc*, 608 F2d 1114, 118 [(CA 6, 1979)]. Each unfair competition case "is determined upon its own facts and relief is based upon the principles of common business integrity." *Good Housekeeping Shop v Smitter*, 254 Mich 592, 596[;] 236 NW 872 (1931) (citation omitted). The term *unfair competition* may encompass any conduct that is fraudulent or deceptive and tends to mislead the public. *Clairol*, [*supra*,] at 1120 (citing *Revlon, Inc v Regal Pharmacy, Inc*, 29 FRD 169, 174 (ED Mich[,] 1961)); *Hayes–Albion v Kuberski*, 421 Mich 170[;] 364 NW2d 609 (1984) (misappropriation of trade secrets); *Heritage Optical Center, Inc v Levine*, 137 Mich App 793[;] 359 NW2d 210 (1984) (defamation of competitor). [Pappas and Steiger, Michigan Business Torts, pp 60-62 (citations omitted).]

Plaintiff's claim for unfair competition appears to be based solely on the principle that Sentek engaged in the fraudulent or deceptive harm of plaintiff as its competitor. We find that plaintiff has failed to demonstrate a genuine issue of material fact with respect to its claim for unfair competition.

Plaintiff contends that Thomas Kennedy, Sentek's general manager, utilized plaintiff's pricing information, as provided by Dolan, in conjunction with Sentek's January 6, 1999, pricing quotation. However, although Dolan provided Kennedy a pricing rate, Kennedy testified that the pricing information was not utilized in providing ALPS with a pricing quotation. Furthermore, Kennedy indicated that the pricing information was irrelevant in terms of Sentek's pricing quotation.

Plaintiff also contends that Sentek obtained a workforce familiar with their job, which resulted in savings that could be passed on to ALPS. Similar to plaintiff's claim for tortious interference, plaintiff has failed to demonstrate the actionable nature of its claim. Although Sentek did, in fact, hire some of plaintiff's former employees, Arlene Atikian testified that plaintiff's employees were not under contract with plaintiff and that the employees were free to

seek other employment. Additionally, plaintiff gave its employees three choices, which included the choice to terminate their employment relationship with plaintiff.

Finally, plaintiff contends that Sentek knew the disclosure of the pricing information to it was part of a scheme to hire two key employees, Yap and Linaac, in violation of their non-competition agreements, in order to obtain plaintiff's workforce. Yet, plaintiff has failed to produce any evidence in support of this allegation.

The trial court properly granted Sentek's motion for summary disposition on plaintiff's claim for unfair competition.

III. Mediation Sanctions[1]

In Docket No. 235398, plaintiff contends that the trial court erred in awarding mediation sanctions in favor of Sentek. We disagree, but for reasons other than those relied upon by the trial court. "We review the court's decision whether to grant mediation sanctions de novo because it involves a question of law, not a discretionary matter." *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997). This issue also involves "interpretation of a court rule, which, like matters of statutory interpretation, is a question of law that we review de novo." *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001).

The issue presented here is whether plaintiff's settlement with ALPS, Linaac, and Yap for $525,000 falls under the definition of "verdict" set forth in MCR 2.403(O)(2) and thus, subject to being aggregated pursuant to MCR2.403(O)(4). We find that it does not.

At the time this case mediated, MCR 2.403(O) provided in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.
>
> (2) *For the purpose of this rule* "verdict" includes,
>
> > (a) a jury verdict,
> >
> > (b) a judgment by the court after a nonjury trial,
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> > (c) a judgment entered as a result of a ruling on a motion filed after mediation. [Emphasis added.]

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[1] "In 2000, the name of the process described in MCR 2.403 was changed from 'mediation' to 'case evaluation.'" *Bauroth v Hammoud*, 465 Mich 375, 376 n 5; 632 NW2d 496 (2001). We use the terminology applicable at the time of the proceedings of this case for ease of reading.

Pursuant to MCR 2.403(O)(2) "only three things qualify as verdicts for the purpose of this rule: "(a) a jury verdict, (b) a judgment by the court after a nonjury trial, and (c) a judgment entered as a result of a ruling on a motion filed after mediation."' *Jerico Construction, Inc v Quadrants, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 233674; 233719, issued June 10, 2003).

Here, the order of dismissal was entered based on a settlement -- not by *any* of the three methods clearly and unambiguously set forth in MCR 2.403(O)(2). Because this settlement was not a "verdict" for the purpose of MCR 2.403(O), the amount of the settlement could not be considered in deciding whether Sentek was entitled to mediation sanctions. The only "verdict" in this case is the order granting summary disposition entered after mediation was rejected. MCR 2.403(O)(2)(c). Because both parties rejected the mediation evaluation, Sentek was "entitled to costs only if the verdict is more favorable to [it] than the mediation evaluation." MCR 2.403(O)(1). Because the "verdict" was clearly more favorable to Sentek than the $10,000 evaluation, the trial court properly found, although for the wrong reason, that Sentek was entitled to mediation sanctions pursuant to MCR 2.403(O). *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 685 n 8; 630 NW2d 356 (2001).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs