IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

JKR, LLC, a Washington domestic limited liability company, Appellant, v. LINEN RENTAL SUPPLY, INC. a Washington domestic corporation, d/b/a Tomlinson Linen, d/b/a Tomlinson Linen Services; GARY TOMLINSON and JANE DOE TOMLINSON, and the marital community composed thereof; and TIMOTHY TOMLINSON and JANE DOE TOMLINSON, and the marital community composed thereof, Respondents.	)	No. 63427-5-I DIVISION ONE UNPUBLISHED OPINION FILED: August 23, 2010

SPEARMAN, J.—In this action for tortious interference with a contract, there are no disputed issues of fact regarding the element of improper purpose or improper means. The trial court properly granted summary judgment. We affirm.

FACTS

JKR, LLC (d/b/a Service Linen Supply, hereinafter referred to as Service Linen), provides commercial linen service to restaurants. New Richmond Supply Laundries, Inc., was a competitor owned by Gary and Tim Tomlinson. In 2000,

Service Linen purchased the assets of New Richmond, including New Richmond's customer contracts, which were worth 85 percent of the $4 million purchase price. The Purchase and Sale Agreement gave Service Linen the exclusive right to use the New Richmond name and logo for five years, with an option to purchase it permanently thereafter. Service Linen exercised that option, and purchased the name for $25,000. In 2005, the Tomlinsons started another linen supply company called Tomlinson Linen Service (Tomlinson Linen). Tomlinson Linen hired one of Service Linen's former customer service representatives, who began calling Service Linen's clients. Tomlinson Linen also sent out a mailing piece that read:

> We used to be New Richmond Supply Laundries. Tomlinson Linen Service is bringing back the high levels of service and product quality that many of you remember when we were New Richmond.

Over several years, many of Service Linen's customers switched to Tomlinson Linen. Service Linen sued for (1) trade name infringement; (2) passing off; (3) Consumer Protection Act violations; (4) conversion; (5) civil conspiracy; (6) misappropriation of trade secrets; and (7) tortious interference with a contract. Tomlinson Linen moved for summary judgment dismissal of all claims, and Service Linen agreed to dismiss all but the tortious interference claim. The trial court denied the motion for summary judgment as to that claim and dismissed all the others.

Tomlinson Linen conducted numerous additional depositions of representatives of Tomlinson Linen and Service Linen customers, after which

Tomlinson Linen again moved for summary judgment. The trial court granted the motion on multiple grounds, including Service Linen's failure to demonstrate a disputed issue of material fact regarding whether Tomlinson Linen improperly interfered with Service Linen's existing contracts. Service Linen appeals.

DISCUSSION

Standard of Review

This court reviews summary judgments de novo. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). "'Summary judgment is appropriate when there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.'" Id. (internal quotation marks omitted) (quoting Locke v. City of Seattle, 162 Wn.2d 474, 483, 172 P.3d 705 (2007), and CR 56(c)). "When determining whether an issue of material fact exists, the court construes all facts and inferences in favor of the nonmoving party." Mosquera-Lacy, 165 Wn.2d at 601. A genuine issue of material fact exists where reasonable minds could differ regarding the facts controlling the outcome of the litigation. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

"Summary judgment is subject to a burden shifting scheme." Mosquera-Lacy, 165 Wn.2d at 601. "'After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.'" Id. (quoting Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98

(1986)). In doing so, the nonmoving party "'may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain.'" Id. at 602 (alteration in original) (quoting Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

Elements of Tortious Interference

The trial court granted Tomlinson Linen's motion for summary judgment on multiple grounds, including that Service Linen had failed to demonstrate the "improper purpose or means" element of tortuous interference. Service Linen argues this was error because "improper purpose or means" is an element only for the tort of interference with a business expectancy, but not for interference with an existing contract. We disagree.

Service Linen contends the trial court erroneously relied on Pleas v. City of Seattle, 112 Wn.2d 794, 800-02, 774 P.2d 1158 (1989), and Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120, 839 P.2d 314 (1992), because neither case involved interference with existing contracts, but instead involved interference with business expectancies. According to Service Linen, neither of those cases, "nor any other Washington case," addresses whether the improper purpose element is applied in the context of interference with an existing contract.

Service Linen is mistaken. Many Washington appellate cases have applied the "improper purpose or means" element in the context of interference with an

existing contract. For example, in Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 930 P.2d 288 (1997), the plaintiff alleged the defendant was "guilty of interference with his contract with his [underinsured motorist] carrier." Leingang, 131 Wn. 2d at 156. Our Supreme Court held that a tortious interference claim requires proof of an improper purpose:

> (1) the existence of a valid contractual relationship or business expectancy; (2) that the defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.

Leingang, 131 Wn.2d at 157. Indeed, the court went on to cite other cases requiring proof of improper purpose, and even cited the Restatement (Second) of Torts. See Leingang, 131 Wn.2d at 157 (citing Schmerer v. Darcy, 80 Wn. App. 499, 505, 910 P.2d 498 (1996); Restatement (Second) of Torts § 773 (1977)). Under the Restatement (Second) of Torts, tortious interference with an existing contract requires proof that the interference is improper: "One who intentionally and improperly interferes with the performance of a contract … is subject to liability." Restatement (Second) of Torts § 766 (1977); see also Restatement (Second) of Torts § 766 cmt. a (1977) ("In order for the actor to be held liable, this Section requires that his interference be improper.").

Other cases applying the "improper purpose or means" element in the context of interference with an existing contract include Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276 (2006) (contract to

hold a gun show); Havsy v. Flynn, 88 Wn. App. 514, 945 P.2d 221 (1997) (PIP insurance contract); Schmerer, 80 Wn. App. at 505 (real estate contract); Fischer v. Parkview Properties, Inc., 71 Wn. App. 468, 859 P.2d 77 (1993) (contract to construct a fence). Likewise, the pattern jury instruction for tortious interference with a contract, approved by the Washington Supreme Court Committee on Jury Instructions, includes "improper purpose or means" as an element. See 6A Washington Practice: Washington Pattern Jury Instructions: Civil 352.01 (5th ed. 2005).

In sum, tortious interference with an existing contract requires proof of improper purpose or improper means, Leingang, 131 Wn.2d at 157, and the trial court did not err in so holding.

No Genuine Issues of Material Fact Preclude Summary Judgment

Service Linen next argues the trial court erred in granting summary judgment because, among other things, questions of material fact remained about whether Tomlinson Linen used improper means to interfere with Service Linen contracts. Specifically, Service Linen contends that whether Tomlinson Linen's interference was improper is a question for the trier of fact. In support of this proposition, Service Linen relies upon the following:

> [A]s with negligence, when there is room for different views, the determination of whether the interference was improper or not is ordinarily left to the jury, to obtain its common feel for the state of community mores and for the manner in which they would operate upon the facts in question.

Restatement (Second) of Torts § 767 cmt I. Here, however, there is no "room for different views." The undisputed evidence shows no questions of fact exist as to the "improper means" alleged by Service Linen.

Service Linen describes two ways in which it contends that Tomlinson Linen used "improper means" to interfere with its contracts. First, Service Linen argues it was improper for Tomlinson Linen to ask potential customers for a copy of Service Linen's invoices and use the information to submit a lower bid. For interference to be carried out using improper means, those means must be wrongful by some measure beyond the interference itself. Pleas, 112 Wn.2d at 804 (citing Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 582 P.2d 1365, 1371 (1978)). Factors the court considers when determining whether interference is improper include: "(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties." Restatement (Second) of Torts § 767. Examples of improper means include those means that are wrongful by reason of a statute, regulation, recognized rule of common law, or established standard of trade or profession. Pleas, 112 Wn.2d at 804.

Service Linen relies on J.L. Cooper & Co. v. Anchor Securities Co., 9 Wn.2d

45, 113 P.2d 845 (1941), and Karsh v. Haiden, 260 P.2d 633, 120 Cal. App. 2d 75 (1953). Neither case, however, supports Service Linen's argument that Tomlinson Linen engaged in an improper means of competition. In J.L. Cooper, the respondent sold goodwill in a real estate and insurance company to the appellants. Shortly thereafter, the respondent, working at a new insurance company, began using confidential information about former clients and soliciting those clients for the new employer. The Supreme Court held that the sale of good will of a business includes, "even in the absence of a restrictive covenant, the implied obligation that the seller will not solicit his old customers or do any act that would interfere with the vendee's use and enjoyment of that which he had purchased." J.L. Cooper, 9 Wn.2d at 55. Likewise, in Karsh, the California Supreme Court held that a seller of goodwill has an implied obligation of good faith and fair dealing, such that he must "avoid the appearance of continuing the business sold, or of being its successor." Karsh, 260 P.2d at 637.

Here, unlike J.L. Cooper and Karsh, we need not read "implied" restrictions into the contract between Service Linen and Tomlinson Linen because the contract did include a restrictive covenant: Tomlinson Linen was not to compete for two years. It is undisputed that Tomlinson Linen complied with this obligation, and in fact, did not re-enter the linen business for more than five years after signing the two-year non-compete agreement. J.L. Cooper and Karsh therefore are of no help to Service Linen.

Service Linen also relies on Island Air, Inc. v. LaBar, 18 Wn. App. 129, 566 P.2d 972 (1977), a case decided before our courts adopted the version of tortious interference set out in the Restatement (Second) of Torts. In that case, the defendant indicated an interest in purchasing Island Air, Inc., an airline company that delivered mail and freight to the San Juan Islands under a contract with United Parcel Services, Inc. (UPS). The defendant met with Island Air stockholders and officers, purportedly to obtain and assess particulars about Island Air's business model before a possible purchase. Island Air gave the defendant substantial information, including details about Island Air's contract with UPS, but required that the defendant keep the information confidential, and not use it to compete with Island Air. Island Air, 18 Wn. App. at 133-35. The defendant violated this agreement by using the confidential pricing information it had obtained from Island Air to submit a lower bid to UPS, which UPS accepted. Id. at 134-35.

Here, unlike Island Air, there is no allegation that Tomlinson Linen knowingly sought out confidential information and then used such confidential information in violation of an agreement not to compete. Indeed, Service Linen argues only that Tomlinson Linen should not have asked *customers* about pricing. Service Linen provides no other authority supporting this argument, and we decline to hold that merely inquiring about a competitor's pricing and offering a lower price to a potential customer constitutes an improper means.

The second improper means alleged by Service Linen involves the mailing

piece sent out by Tomlinson Linen that used the "New Richmond" name in violation of the parties' licensing agreement. According to Service Linen, this mailing piece improperly caused numerous customers to cancel contracts with Service Linen.

Tomlinson Linen meticulously deposed the corporate representatives of each and every business that allegedly switched from Service Linen to Tomlinson Linen, and all of them testified that they did not recall receiving the mailing. Service Linen presented no evidence to refute this testimony. At most, Service Linen offered the testimony of Tim Tomlinson to impeach the testimony of Ken Moriarty of Classic Catering. Moriarty testified that his initial contact with Tomlinson Linen was through Ken Bowman, and that he had no recollection of receiving a mailing piece from Tomlinson Linen. Tomlinson testified to the effect that, although he had no personal knowledge, it was his belief that Classis Catering responded to the mailing. Service Linen contends that the trial judge improperly weighed this testimony, and argues that credibility is an issue properly reserved for the jury.

It is well settled in Washington, however, that a party opposing summary judgment "'may not merely recite the incantation, "Credibility," and have a trial on the hope that a jury may disbelieve factually uncontested proof.'" Laguna v. State Dep't of Transp., 146 Wn. App. 260, 266-67, 192 P.3d 374 (2008) (internal quotation marks omitted) (quoting Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 627, 818 P.2d 1050 (1991)). As we held in that case:

Since a defendant without the burden of proof may move for

> summary judgment based on nothing more than the absence of evidence to support the plaintiff's case, the nonmoving party should not be able to escape summary judgment simply by impeaching the defendant's witness without providing proof sufficient to prove the plaintiff's case.

Id. at 266 n.12. Here, Tomlinson Linen offered uncontroverted testimony that none of Service Linen's customers terminated their contracts as a result of the allegedly improper mailing piece. Service Linen's contention that the testimony is not credible or is subject to impeachment does not create a material factual dispute.

Because no questions of fact remain as to the element of improper purpose or means, we hold that the trial court properly granted summary judgment. In light of this determination, we need not address the parties' further arguments regarding the knowledge element.

Attorney Fees

Tomlinson Linen cross-appeals the trial court's order denying attorney fees on grounds the lawsuit was frivolous. Tomlinson Linen also seeks fees on appeal. "'A lawsuit is frivolous when it cannot be supported by any rational argument on the law or the facts.'" Skimming v. Boxer, 119 Wn. App. 748, 756, 82 P.3d 707 (2004) (quoting Tiger Oil Corp. v. Dep't of Licensing, 88 Wn. App. 925, 938, 946 P.2d 1235 (1997)). Washington courts recognize that "an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 241, 119 P.3d 325

(2005) (quoting Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd., 107 Wn.2d 427, 442-43, 730 P.2d 653 (1966)); see also RAP 18.9(a).

We reject Tomlinson Linen's argument and decline to award fees. Although the trial court granted the second motion for summary judgment, the court denied the first such motion, largely on the ground that Tomlinson Linen's mailing piece could have constituted improper means. Service Linen's lawsuit therefore had a rational argument on both the law and the facts.

Affirmed.

Spearman, J.

WE CONCUR:

Leach, A.C.J.

Grosse, J.