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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001186-MR

DOYLE TURNER

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
ACTION NO. 15-CI-00076

KENTUCKY RIVER COMMUNITY
CARE; and BENJAMIN GLENN BAKER,
individually and d/b/a MOUNTAIN
PRIDE SERVICES

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: Kentucky River Community Care, Inc. (KRCC), a non-profit corporation, owns several properties in Eastern Kentucky. In 2014 and 2015, it publicly advertised requests in various print media sources for bids from contractors for lawn mowing services for some of its properties located in the northern counties of that region. One such lawn mowing services contractor,

Doyle Turner d/b/a Turner Lawn Service (Turner), submitted bids in response to KRCC's advertisements. However, Turner was unsuccessful. Instead, KRCC awarded the contracts to another bidding contractor, Benjamin Glenn Baker d/b/a Mountain Pride Services (Baker). Due to these events, Turner filed suit against KRCC and Baker in Breathitt Circuit Court. In his complaint, Turner alleged KRCC was liable to him for the tort of negligent misrepresentation, and Baker was liable to him for the tort of intentional interference with a prospective contractual relationship.

After a period of motion practice, KRCC and Baker tendered a motion to dismiss, each arguing Turner could not prove the requisite elements of either tort. Their motion (which the circuit court alternatively considered as a motion for summary judgment) was granted; this appeal followed. Turner contends both of his claims were viable. Upon review, we affirm.

Summary judgment¹ serves to terminate litigation where “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rule of Civil Procedure (CR) 56.03. It should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at

¹ As indicated, the circuit court “alternatively” treated the appellees’ motion as a motion to dismiss, per Kentucky Civil Rule (CR) 12.02(f), and as a motion for summary judgment after it also considered matters outside the pleadings. Where a court considers matters outside the pleadings in its review of a CR 12.02(f) motion, however, the motion is effectively converted to a motion for summary judgment. *See* CR 12.02. For the sake of simplicity, we review this matter under the summary judgment standard.

trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991).

Here, this appeal is effectively resolved by resorting first to Turner's overarching theories of his claims and then by resorting to the plain language of the advertisements to which Turner responded in 2014 and 2015. As to the former, Turner succinctly described the operative details of his theories as follows:

Kentucky River Community Care placed conditions on its bid for the northern [sic] counties which included rules regarding the number of mowings of all properties and the manner in which said properties were to be mowed, which were not followed by Mr. Baker. These requirements were negligently not verified by Kentucky River Community Care, who allowed a non-compliant bidder to maintain the contract. Because of this negligence by Kentucky River Community Care who failed to verify compliance, the successful bidder was able to procure and maintain the work with an unrealistically low bid on said properties. *Because I was the next lowest bidder, but for this negligence by KRCC in oversight, I would have procured the bid and performed the work under the terms.*

(Emphasis added.)

“Justifiable reliance” is an essential element of the tort of negligent misrepresentation.² For the purpose of his negligent misrepresentation claim

² In *Presnell Constr. Managers, Inc. v. EH Constr., LLC*, 134 S.W.3d 575 (Ky. 2004), the Supreme Court of Kentucky adopted the tort of negligent misrepresentation, as defined in Restatement (Second) of Torts § 552 (1976). Section 552 was quoted in *Presnell*, 134 S.W.3d at 580, as follows:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

against KRCC, Turner contends he *justifiably relied* upon a misrepresentation from KRCC to the effect that if his bid verifiably fulfilled all of the conditions set forth in KRCC's advertised bid request and his bid was also the lowest, KRCC *would* have awarded him the lawn mowing contracts in 2014 and 2015.

“The existence of a valid business relationship or its expectancy” is an essential element of the tort of intentional interference with a prospective contractual relationship.³ For the purpose of this claim, Turner contends that, but

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

(Emphasis added.)

³ In *National Coll. Athletic Ass'n v. Hornung*, 754 S.W.2d 855 (Ky. 1988), the Supreme Court of Kentucky set forth the principles governing the tort of intentional interference with a prospective contractual relationship. It held that Sections 766B, 767 and 773 of the Restatement (Second) of Torts reflect the prevailing law in Kentucky. To recover under this cause of action, a claimant must plead and prove the following elements: (1) the existence of a valid business relationship or its expectancy; (2) a defendant's knowledge thereof; (3) an intentional act of interference; (4) an improper motive; (5) causation; and (6) special damages. In deciding whether the actor's actions were improper, a court must consider the factors set forth in Section 767 of the Restatement (Second) of Torts; *Hornung*, 754 S.W.2d at 858. Those factors are (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. Though a defendant's actions may be “improper,” he may nevertheless not be liable,

for Baker's interference, he *would* have been awarded the lawn mowing contracts and, thus, would have had a contractual relationship with KRCC.

With that said, both of Turner's claims in this matter are defeated by the plain language of the advertisements to which Turner responded in 2014 and 2015. In relevant part, each provided:

Contractors must have Workers Compensation and General Liability Insurance through the service agreement season with the property owner listed as a certificate holder and additional named insured.

Separate bids are requested per site for each Kentucky River Community Care, Inc., location.

Bid will be awarded to the lowest qualified bidder.

Sites can be inspected any time during normal business hours.

Kentucky River Community Care, Inc., *reserves the right to reject any or all bids.*

(Emphasis added.)

Considering the above-italicized language, both of Turner's claims necessarily fail and the circuit court properly dismissed them. KRCC plainly specified that *no* bidding contractor should have *any* expectation of being awarded a lawn mowing contract, even *if* the contractor satisfied every condition of its bid request and had the lowest bid. KRCC reserved "the right to reject any or all bids."

Accordingly, we AFFIRM.

if he acted in good faith in asserting a legally protected interest. *Hornung*, 757 S.W.2d at 858.

ALL CONCUR.

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