Clarity Capital Management Corporation, Appellant V. Aretha Ryan Et Al. Respondents

2021 | Cited 0 times | Court of Appeals of Washington | July 26, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CLARITY CAPITAL MANAGEMENT CORPORATION, a Washington corporation,

Appellant,

v.

ARETHA RYAN, an individual; TEDDY J. NEWMAN, an individual; and SALISH WEALTH MANAGEMENT, INC., a Washington corporation,

Respondents. No. 82022-2-I

DIVISION ONE

UNPUBLISHED OPINION

SMITH, J. Clarity Capital Management Corporation appeals the trial order granting summary judgment in favor of Aretha Ryan, Teddy Newman, and Salish Wealth Management Inc. Clarity claims that the court erred by granting summary judgment on all of its claims, by denying its motion to continue the summary judgment hearing, by denying its motion for reconsideration, and in its award of attorney fees to the respondents. Finding no error, we affirm.

FACTS

Multop Financial was a financial planning company in Bellingham,

Washington, owned by Phillip Multop. Matthew Bumstead is the president and owner of Clarity, a financial services firm which sought to acquire Multop and Phillip Multop executed a purchase and sale agreement (PSA). The PSA sold Multop Financial accounts and related assets to Clarity and gave Clarity the right to use the name Multop Financial for two years. It also assigned a contract between Multop Financial and a separate consulting firm to Clarity.

Ryan and Newman were financial advisors at Multop Financial. As employees, they each signed an employee manual that detailed employment policies and benefits. On the first page of each manual, in a section labeled constitute nor be construed as . . . a contract between Multop Financial and any of its employees. The Manual is a summary of our policies, which are presented The manuals contained provisions barring employees from disclosing any information provided by clients and stating that an employee s obligation of confidentiality would continue for three years after employment. Newman also signed a personnel policies document that contained an agreement not to compete for financial work within 50 miles for three years after his employment with Multop Financial. Throughout their time at Multop Financial, Ryan and Newman each signed various other agreements, including an agreement to sell Newm and various confidentiality agreements that contained similar provisions.

When Clarity bought Multop Financial, Newman and Ryan met with

Bumstead and expressed that they would continue to work for the firm. As part

of the transfer, Ryan signed a new employee manual with Clarity that contained

the same disclaimer that it was not a contract, as well as confidentiality and noncompete provisions. About a month later, on November 4, Ryan and

Newman gave notice of their resignation and quickly began working at Salish

According to Bumstead, they immediately began contacti convince them to move to Salish and made false statements to convince them to

do so. These clients left Clarity for Salish and took with them assets worth over

$40,000,000.

Clarity sued Ryan, Newman, and Salish. It alleged that Ryan and

Newman had breached their contracts and alleged that Clarity had justifiably

relied on Ryan nuals. It also

accused Ryan, Newman, and Salish of intentional interference with business

expectancy and defamation.

Salish, Ryan, and Newman moved for summary judgment, claiming that

was seeking to enforce, that it was estopped from claiming the employee manual

was a contract because of the disclaimer that it was not a contract, and that

Washington law does not allow an employer to pursue a claim for a violation of

its own noncontractual employee handbook. The motion also challenged

asserting

Clarity moved to continue the summary judgment hearing so that it could

depose Ryan, Newman, and a representative of Salish to learn more about their

intent and actions after leaving Clarity. It also responded to the motion for summary judgment, but it did not address the defamation claim except to assert

that respondents had not made any substantive reference to the claim beyond

stating that it was derivative.

The trial court denied the motion for a continuance and granted the motion

reconsideration, contending that the court had misapplied the law. The court

denied the motion for reconsideration and granted attorney fees to Ryan,

Newman, and Salish, based on attorney fee provisions in the employee manuals

and Multop Financial confidentiality agreements.

Clarity appeals.

ANALYSIS

Clarity challenges the trial breach of contract, equitable reliance, tortious interference with business

expectancy, and defamation claims. It also claims the trial court abused its

discretion by denying its motion for continuance and motion for reconsideration

and by awarding attorney fees to the respondents. We affirm on all counts.

Standard of Review

We review an order on summary judgment de novo. Strauss v. Premera

Blue Cross evidence and all reasonable inferences from the evidence in the light most

Keck v. Collins, 184 Wn.2d 358, 370, 357

ropriate only when no genuine

issue exists as to any material fact and the moving party is entitled to judgment Keck, 184 Wn.2d at 370 (footnote omitted). decision on a motion to continue or a motion for reconsideration is reviewed

for

abuse of discretion. Tellevik v. 31641 W. Rutherford St., 120 Wn.2d 68, 90, 838 P.2d 111, 845 P.2d 1325 (1992) (motion to continue); Weems v. N. Franklin Sch. Dist., 109 Wn. App. 767, 777, 37 P.3d 354 (2002) (motion for reconsideration), abrogated on other grounds by Fed. Way Sch. Dist. No. 210 v. Vinson, 172 Wn.2d 756, 261 P.3d 145 (2011). The court abuses its discretion if its decision

Briggs v. Nova Servs.,

135 Wn. App. 955, 961, 147 P.3d 616 (2006), , 166 Wn.2d 794, 213 P.3d 910 (2009).

Contract Claims

Clarity asserts that the court erred by dismissing its contract claims. Because Clarity had no contract with Ryan or Newman to enforce, we disagree.

1. Multop Documents

First, Clarity is not a party to any contracts between Ryan or Newman and Multop Financial, and therefore it may not seek to enforce them. 1 Generally, someone who is not a party to a contract cannot seek to enforce the contract. Trane Co. v. Brown-Johnston, Inc., 48 Wn. App. 511, 520, 739 P.2d 737 (1987). However, if an owner of contract rights assigns its rights to a third party, the

Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 208, 194 P.3d 280

1 For purposes of this section, we assume without deciding that Ryan and Newman had entered into enforceable noncompete agreements with Multop Financial. (2008) (quoting Bank v. , 123 Wn.2d 284,

292, 868 P.2d 127 (1994)), review granted and dismissed, 166 Wn.2d 1015

(2009). But contracts for professional services are personal and therefore not

assignable. Kim v. Moffett, 156 Wn. App. 689, 704, 234 P.3d 279 (2010).

Here, while the PSA

nonparty to Clarity, it did not attempt to assign or even make reference to any

employee contracts. The only evidence that Clarity cites to support its claim that

compete agreements were assigned to Clarity is an excerpt from

Phil

I am informed that Aretha Ryan and Teddy Newman have alleged that it was not part of [the sale of assets to Clarity] that their agreements with my firm would transfer to Clarity as part of this transaction. . . . That is not true. They both understood that their agreements were transferring to Clarity as part of our transaction. In fact, they requested that specifically of me, to make sure they had job security after a new owner took over. They clearly understood

was intended with them to continue as part of the team; hence s with them prior to the sale. . . . . It would make no sense for me to not transfer my agreements with my staff as part of the deal. That was intended all along. In fact, that is a main reason as to why I chose Matt Bumstead as the successor because he fully intended to keep all staff in place.

employment would continue with Clarity but fails to establish that any

confidentiality or noncompete agreements were assigned or even discussed.

noncompete agreements

Clarity is contradicted by the plain language of the PSA, which explicitly states: . . . constitute[s] the sole and entire agreement of the parties to

this Agreement with respect to the subject matter contained herein, and

supersede[s] all The PSA does not purport to assign any agreements with Ryan or Newman to

Clarity. Even if it did, such agreements for Ryan

financial services would not be assignable. Kim, 156 Wn. App. at 704-05. The

court therefore did not err by concluding that Clarity could not sue on the basis of

2. Clarity Handbook

Furthermore, the Clarity employee manual signed by Ryan does not form

the basis for a breach of contract cause of action. Nye v. Univ. of

Wash., 163 Wn. App. 875, 882-83, 260 P.3d 1000 (2011). Although the manual

contained confidentiality and noncompete provisions, the first page contained an

explicit statement te nor be construed as . . . a

contract between Clarit Given this plain

disclaimer, the Clarity manual cannot be considered a contract. 2

Clarity objects that the court was not permitted to rule that the handbook

did not constitute a contract because there was insufficient discussion of this

2 Because we conclude that Clarity was not a party to any enforceable noncompete contract in this case, we do not address its argument that the manuals were sufficiently specific to constitute contracts. issue in the summary judgment briefing. It is incorrect.

summary judgment briefing contended that Clarity was estopped from claiming

shall not

constitute . . . may

uphold summary judgment on any grounds that are established by the pleadings

and supported by the record. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d

burden of proof even where this was not discussed below). 3

3. Justifiable Reliance

Clarity next contends that even if its employment manual did not constitute

a contract, it Ryan and Newman that

they agreed to the noncompetition and confidentiality clauses in the Clarity

manual and various Multop Financial claim precisely tracked the test from Thompson v. St. Regis Paper Co., 102

Wn.2d 219, 230, 685 P.2d 1081 (1984), which requires an employee seeking to

enforce promises in an whether any

statements therein amounted to promises of specific treatment in specific

situations; (2) if so, whether the employee justifiably relied on any of these

promises; and, finally, (3) whether any promises of specific treatment were

4 Bulman v. Safeway, Inc., 144 Wn.2d 335, 340-41, 27 P.3d 1172

3 This reasonin contract claims. 4 liance claim alleged that (1) statements in the Employee Manual and its associated documents regarding

confidentiality of client information and non-solicitation amount to promises of (2001). In Thompson, our Supreme Court noted after setting forth this cause of

manuals. They can specifically state in a conspicuous manner that nothing

contained therein is intended to be part of the employment relationship and are

Thompson reasoning relied on the s

therefore decline to extend it to an employer seeking to enforce a manual against

its employees, especially where, as here, the employer took advantage of the

exception in Thompson and conspicuously noted that the manual was not a

Clarity objects that it was not relying on Thompson but instead was

making a generic claim that it justifiably relied on Ryan representations. 5

We reject its assertion assent to a document drafted by Clarity, where Clarity specifically indicated that

promise of employment

Clarity also

eached

5 This appears to be a claim based on promissory estoppel, although Clarity does not characterize it as such. Promissory estoppel permits a party to enforce a non promisor should reasonably expect to cause the promisee to change his position

and (3) that does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by Kim v. Dean, 133 Wn. App. 338, 348, 135 P.3d 978 (2006). could not justifiably rely on Ryan

when those promises were specific to their employment with Multop Financial.

Clarity also disagrees on the grounds that the court should not have

granted summary judgment because whether an employee manual creates a

contract is an issue of fact. minds

cannot differ as to whether language sufficiently constitutes an offer or a promise

of specific treatment in specific circumstances, as a matter of law the claimed

Swanson v. Liquid Air

Corp., 118 Wn.2d 512, 522, 826 P.2d 664 (1992); Quedado v. Boeing Co., 168

Wn. App. 363, 373-75, 276 P.3d 365 (2012) (as a matter of law, employee

documents that contained disclaimer of contractual rights on first page did not

create binding promise). Similarly, t question of fact, summary judgment is appropriate if reasonable minds could

Cornerstone Equip. Leasing, Inc. v. MacLeod, 159

Wn. App. 899, 905, 247 P.3d 790 (2011). Because the facts here can only lead

to the conclusion that Clarity did not justifiably rely on a promise, summary

judgment on this issue was proper.

4. Implied Contract

Finally, implied contract claim. Clarity claimed that even if the employment documents

discussed above were not contracts intentions of the parties to the transaction, and there must be a meeting of minds Troyer v. Fox, 162 Wash. 537, 554,

298 P. 733 (1931) (emphasis omitted). Here, viewed in the light most favorable

rity for a month,

expressing an intent to stay there, and abiding by corporate policies while they

worked there. Nothing in these actions establishes an intent to be bound by a

covenant not to compete after leaving Clarity. We would be especially wary to

policy requires us to carefully examine covenants not to compete, even when

protection of a legitimate business interest is demonstrated, because of equally

competing concerns of freedom of employment and free access of the public to

professional services Knight, Vale & Gregory v. McDaniel, 37 Wn. App. 366,

370, 680 P.2d 448 (1984). ms.

Tortious Interference with Business or Contractual Expectancy

tortious interference with business expectancies or contractual expectancies.

The elements of tortious interference are: (1) The existence of a valid business

expectancy; (2) defendant's knowledge of that expectancy; (3) defendant's

intentional interference with that expectancy; (4) defendant's improper purpose or

use of improper means in so interfering; and (5) the plaintiff's resultant damages.

Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn. App. 732, 745, 935

P.2d 628 (1997)

was not improper because Salish, Ryan, and Newman retained the right to compete with Clarity for business. Goodyear, 86 Wn. App. at 746. Therefore,

the court did not err by entering summary judgment on this issue.

Defamation Claim

Clarity next challenge defamation claim, contending that the respondents did not meet their burden to

show the absence of an issue of material fact. We disagree.

The purpose of summary judgment is to avoid an unnecessary trial when

there is no genuine issue of material fact. Jacobsen v. State, 89 Wn.2d 104,

108, 569 P.2d 1152 (1977). When a defendant brings a motion for summary

an issue of material fa Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770

P.2d 182 (1989). If the moving party does so, then burden shifts to the plaintiff.

Young sufficient to establish the e judgment is proper. Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett,

477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

The moving defendant can meet their burden by showing that there is an

Young, 112 Wn.2d at 225

n.1. In such a case, the moving party does not need to support the motion with

affidavits but must still identify the portions of the record which demonstrate the

absence of a genuine issue of material fact. White v. Kent Med. Ctr., Inc., 61

Wn. App. 163, 170, 810 P.2d 4 (1991). In White, White sued for medical malpractice and the defendants moved for summary judgment, in part on the

5-66. White responded by

pointing to excerpts of depositions that she claimed did establish the standard of

care, and it was not until their reply that the defendants pointed to evidence

supporting their claim. White, 61 Wn. App. at 166-67, 170. We noted that the

defendants t did not reverse

negative, and in some circumstances the only way that the moving party will be

able to show that there is no material issue of fact is by way of reply to the

res White, 61 Wn. App. at 170-71. We

strict requirements [of the initial burden] without having made specific citations to

the record in White, 61 Wn. App. at 171.

We conclude that this is one of those rare instances. The respondents

notably cursory, there was

a similarly marked lack of evidence to support defamation in the record. In fact,

the only evidence in support of this claim was a declaration from Bumstead which

stated:

Ryan, Newman, and Salish have engaged in a systematic campaign of false statements to Clarity clients with the goal of misleading Clarity clients and taking them . . . . . The false statements . . .

have included statements about the following: That Multop is no longer in business. the business.

That the remaining advisors at Clarity have no experience. That the previous owner of Multop Financial, Phil Multop, is not working in the business any longer. [6]

complaint. 7 See LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)

llegations in the

pleadings but must set forth specific facts showing that there is a genuine issue

for trial They are also woefully inadequate as evidence, given their lack of

foundation and the fact that they appear to be hearsay. Dunlap v. Wayne, 105

Wn.2d 529, 535-36, 716 P.2d 842 (1986) (summary judgment dismissal of

defamation claim was proper where only evidence of false statements was based

on inadmissible hearsay). We have noted that it is

and conclude that in this case, the respondents met their burden by pointing out

that Clarity had failed to provide support for its defamation claim. White, 61 Wn.

App. 170-71. Clarity subsequently failed to point to any evidence of defamation

in its responsive pleading, apparently because of its belief that the respondents

6 The respondents note that in our review of a summary judgment order, consider only evidence and issues called to the attention of the trial court. Mithoug v. Apollo Radio of Spokane, 128 Wn.2d 460, 462, 909 P.2d 291 (1996)

(emphasis omitted) (quoting RAP 9.12). This declaration was not called to the attention of the trial court by any party at summary judgment, and we discuss it only to the extent that it bears on whether the respondents met their burden. 7 The only alteration belief was incorrect. Respondents met their burden for summary judgment by

pointing out Clarity failure to offer any support for its defamation claim.

Accordingly, we conclude that the trial court did not err by granting summary

judgment on the defamation claim.

Motion for Continuance

Clarity also claims that the court abused its discretion by denying its

motion for continuance. We disagree. 8

If a party shows that they cannot present facts essential to justify their

CR 56(f). The court may deny a motion to continue a motion for summary

the moving party does not offer a good reason for the delay in

obtaining the evidence; 2) the moving party does not state what evidence would

be established through the additional discovery; or 3) the evidence sought will

Coggle v. Snow, 56 Wn. App. 499, 507, 784

P.2d 554 (1990).

8 by participating in the summary judgment hearing without objecting, even though Clarity had already filed a motion to this effect. The respondents cite no Washington law to support this contention. See DeHeer v. Seattle Post- Intelligencer cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found Here, Clarity moved for a continuance in order to depose Ryan, Newman,

and a representative of Salish. Clarity claims this continuance was necessary in

order to ascertain Ryan iance on the fact that

they did not have contracts with Clarity restricting their right to move to Salish. 9

ion regarding Ryan valid contract and that Clarity could not reasonably rely on Ryan

representations. Thus, because the information Clarity sought failed to raise a

genuine issue of material fact, the court did not abuse its discretion by denying

the motion to continue.

Motion for Reconsideration

Clarity moved for reconsideration after the court entered summary

judgment on the basis that the court made errors of law. Because we hold that

the court did not err by entering summary judgment, we also conclude that it did

not abuse its discretion by denying the motion for reconsideration.

Attorney Fees

respondent. Clarity claims that (1) the court erred by awarding attorney fees

because there was no contract providing for attorney fees, (2) even if attorney

9 . . . the role that Salish played in encouraging these defections, as well as the specific contacts [Ryan and Newman] made with Clarity client However, Clarity did not identify this as evidence it was seeking below, and so we decline to consider it in determining whether the trial court abused its discretion. fees were justified, the court erred by awarding attorney fees for work on the

tortious interference claim, and (3) disagree.

1. Basis for Attorney Fee Award

Clarity first contends that the court erred by awarding attorney fees based

on the attorney fee provision in the employee manuals. We disagree.

Whether a party is entitled to attorney fees is an issue of law which we

review de novo. Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958 (2001).

RCW 4.84.3

attorney fees to a party seeking to enforce the contract, the prevailing party is

entitled to reasonable attorney fees. We have interpreted this language to

] any action in which it is alleged that a person is liable on a

Herzog Alum., Inc. v. Gen. Am. Window Corp., 39 Wn. App. 188, 197,

when the contract containing the attorneys fee provis Labriola

v. Pollard Grp., Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004). The attorney fee

provision also applies if an assignee seeks to enforce the agreement. See, e.g.,

Sunkidd Venture, Inc. v. Snyder-Entel, 87 Wn. App. 211, 212 n.1, 217, 941 P.2d

16 (1997) (assignee of lease would be entitled to attorney fees if it prevailed on

remand).

Here, Clarity sued for breach of contract based on the confidentiality and

noncompete e of

client account interests. Although the trial court concluded, and we agreed, that there was no assignment of contracts to Clarity and the manuals do not

constitute contracts, Ryan and Newman are entitled to attorney fees because

Clarity was suing for breach of contract based on these documents. If Clarity

had been successful in showing that there was an assignment or that the

manuals were contracts, it would be entitled to attorney fees for breach of

contract. Awarding fees to Ryan and Newman thus c

purpose behind the enactment of RCW 4.84.330 Mut. Sec. Fin. v. Unite, 68 Wn. App. 636, 643,

847 P.2d 4 (1993) (holding that party was not entitled to attorney fees where

other party would not have been entitled to attorney fees if it had prevailed).

Clarity disagrees and contends that we should follow Wallace v. Kuehner,

111 Wn. App. 809, 820, 46 P.3d 823 (2002), in which Division Two declined to

apply the holding of Herzog to a case where the parties seeking fees did not

One has firmly embraced the concept first presented in Herzog Wallace, 111

Wn. App. 821. Indeed, we have applied Herzog to cases like this one, where a

party prevailed on a breach of contract claim by showing that there was no

evidence it had ever entered into the contract that provided for attorney fees.

Bogle & Gates, P.L.L.C. v. Holly Mountain Res., 108 Wn. App. 557, 562-63, 32

P.3d 1002 (2001). We do so again here.

2. Attorney Fees for Tortious Interference

Clarity next contends that the trial court erred by awarding attorney fees to

Salish on the tortious interference claims. However, [t]he court may award attorney fees for claims other than breach of contract when the contract is central

to the existence of the claims, i.e., when the dispute actually arose from the

Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App.

229, 278, 215 P.3d 990 (2009). Here, Clarity alleged tortious interference on the

basis that it had contracts with Ryan and Newman, and that Ryan, Newman, or

those contracts. 10

We

have held that where a contract is central to a tortious interference claim against

a given party, attorney fees may be appropriate even if it was not a party to the

contract. Deep Water, 152 Wn. App. at 278-79. This is the case here.

Tradewell Grp., Inc. v. Mavis, 71 Wn. App. 120, 857

P.2d 1053 (1993), is not persuasive. In that case, we denied attorney fees on a

tortious interference claim because it did not arise out of a contract. Tradewell,

for the tortious interference claims.

3. Reasonableness of Fee Award

Finally, Clarity contends that the amount of fees awarded was

reasonableness of an award, and in order to reverse that award, it must be

shown that the trial court manifestly abused Ethridge, 105 Wn.

10 Cla

expectancy in compliance with the terms of the confidentiality and non-compete provisions of the Employee Manual and othe App. at 460. are reasonable and reflect the time expended, the difficulty of the questions

involved, the skill required, the customary charges of other attorneys, and the

appropriately removed billing records referencing that claim, and have reduced

all entries following the summary judgment hearing by half. These reductions

does not challenge these findings, so they are verities on appeal. State v.

O Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). argument that the fee award is unreasonable. Furthermore, because Ryan,

Newman, and Salish have prevailed on appeal, they are entitled to reasonable

attorney fees for time spent on all issues other than the defamation claim.

Herzog, 39 Wn. App. at 197.

We affirm.

WE CONCUR: