RENDERED: SEPTEMBER 30, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000456-MR

GARY HOWERTON, M.D.
GARY HOWERTON, PLLC — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE A. WILSON, JUDGE
ACTION NO. 14-CI-000235

SOUTHEASTERN EMERGENCY PHYSICIANS, INC.,
COMMONWEALTH HEALTH CORPORATION, INC.,
BOWLING GREEN-WARREN COUNTY COMMUNITY HOSPITAL CORPORATION,
BOWLING GREEN-WARREN COUNTY COMMUNITY HOSPITAL CORPORATION,
d/b/a THE MEDICAL CENTER,
d/b/a THE MEDICAL CENTER at BOWLING GREEN,
d/b/a THE MEDICAL CENTER at SCOTTSVILLE, AND
THE MEDICAL CENTER at FRANKLIN, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, MAZE, AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: Dr. Gary Howerton appeals from separate summary judgment orders granted by the Warren Circuit Court in favor of Southeastern Emergency Physicians, Inc. (SEP) and Commonwealth Hospital Corporation, Inc. (CHC). Dr. Howerton sued the entities after SEP terminated his employment. After review, we affirm.

I. BACKGROUND

SEP provides physician staffing for hospital emergency departments. One of its clients is CHC, the operator of three Kentucky hospitals. The hospitals are located in Bowling Green, Scottsville, and Franklin.

In 2008, Dr. Howerton contracted with SEP to provide emergency care for patients at SEP facilities as an independent contractor. He was initially assigned to CHC's Bowling Green hospital—the same place where he had served as the emergency department Medical Director for more than 25 years. He was later reassigned to CHC's Scottsville facility following a 2011 back surgery. Dr. Howerton worked one shift per week while stationed at the Scottsville location.

While under contract with SEP, Dr. Howerton clashed with hospital administrators over his responsibility to treat non-emergent patients when they presented to CHC's emergency departments. Dr. Howerton evidently felt the emergency room was for emergencies only and would refer non-emergent patients to primary care physicians after an initial screening. The hospital administration, on the other hand, disagreed with Dr. Howerton's policy. Connie Smith, CHC's CEO, testified that she thought the Bowling Green emergency room was a safety

net for the community and was responsible for treating non-emergent and emergent patients alike.

This clash came to a head in 2013 after a particular incident where Dr. Howerton turned away an individual who presented to CHC's Scottsville emergency room with a skin rash. When Connie Smith learned of this incident, she called Dr. Michael Presley, SEP's regional medical director charged with staffing CHC's emergency departments, and made it clear that she did not want Dr. Howerton to continue working at CHC's facilities. Dr. Presley testified that he asked Smith whether she wanted Dr. Howerton removed immediately or wanted him to work throughout the 120-day notice period provided in his employment contract. Smith responded that she was not going to tell Dr. Presley how to manage his physicians.

The following day, Dr. Presley called Dr. Howerton and notified him that he would no longer be scheduled to work at CHC's facilities. Dr. Presley also offered him the opportunity to continue working for SEP, just at a non-CHC facility. After Dr. Howerton refused this offer, Dr. Presley told him SEP was exercising the without-cause provision of his employment contract and terminated his employment. SEP followed up with an email that same day confirming the termination.

As months passed by, Dr. Howerton did not accept that he was terminated without cause, asserting that he was terminated with cause and improperly. Dr. Howerton never worked another shift. SEP nevertheless offered to pay Dr.

Howerton $34,560 for the shifts he would have worked during the 120-day period, as provided in the without-cause portion of his contract. Dr. Howerton also refused that offer and instead sued SEP and CHC under various theories of contract and tort liability. In his complaint, Dr. Howerton alleged that SEP breached the employment agreement by terminating him for cause. Dr. Howerton additionally sought a declaratory judgment regarding the status of his medical privileges with CHC. The tort claims Dr. Howerton alleged started with a claim against CHC for interfering with his employment contract. He then claimed SEP both aided and abetted and conspired with CHC to commit the tortious interference. Dr. Howerton ended with a claim against CHC for negligently hiring Connie Smith. The circuit court rejected each of these claims in a thorough order and entered summary judgment for SEP and CHC. This appeal followed.

II. STANDARD OF REVIEW

When summary judgment is contested on appeal, the reviewing court must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03). Summary judgments are only appropriate when it appears practically impossible for the nonmoving party "to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The moving party has the initial burden to demonstrate there is no genuine factual dispute "with

such clarity that there is no room left for controversy," and if the moving party does so, the nonmoving party must defend with "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482. The nonmoving party cannot prevent summary judgment by merely relying on his own "claims or arguments without significant evidence." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). However, any evidence offered is considered in a light most favorable to the nonmoving party with any doubts resolved in his favor. *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010). Because summary judgments only involve legal questions and the existence or nonexistence of factual issues, they are reviewed *de novo*. *Henninger v. Brewster*, 357 S.W.3d 920, 924 (Ky. App. 2012).

III. DISCUSSION

1. Dr. Howerton's breach of contract claim was properly dismissed

For his first argument on appeal, Dr. Howerton asserts that the trial court erred in dismissing his breach of contract claim against SEP. He maintains SEP breached the agreement by improperly terminating him for cause. He also maintains SEP breached the agreement because Dr. Presley orally informed him during a phone conversation that SEP was terminating his contract rather than informing him in writing. For the following reasons, these arguments are not persuasive.

To succeed on a breach of contract claim in Kentucky, the complaining party must prove a valid contract existed, a breach of that contract, and damages flowing

from the breach. *Metro Louisville/Jefferson County Government v. Abma*, 326 S.W.3d 1, 8 (Ky. App. 2009). The failure of a contracting party to perform an obligation under the contract is a breach. *See* BREACH OF CONTRACT, Black's Law Dictionary (10th ed. 2014). A material breach by one contracting party excuses the other party from performing his contractual obligations. *Dalton v. Mullins*, 293 S.W.2d 470 (Ky. 1956). An unambiguous contract will be enforced according to the plain meaning of its terms.

K.M.R. v. Foremost Ins. Group, 171 S.W.3d 751, 753 (Ky. App. 2005).

Here, Dr. Howerton's employment contract with SEP expressly provided either party with the ability to terminate the agreement "without cause by giving written notice of termination to the other party not less than 120 days prior to the date of termination." Nothing in this section required the written notice to be given first or barred the other party from delivering the bad news orally before providing written notice. Hence, when SEP confirmed Dr. Howerton's termination in the follow-up email and referenced the 120-day notice period, it properly exercised its rights under the clear language of the contract. SEP did not breach the agreement.

2. Dr. Howerton agreed that his medical staff privileges at CHC would terminate upon termination of his employment with SEP

When Dr. Howerton first contracted with SEP in 2008, he also signed certain documents titled "Physician Waiver Agreement." These agreements clearly provided that Dr. Howerton's medical staff privileges and membership at any of CHC's facilities would terminate the same day his relationship with SEP

terminated. Dr. Howerton periodically renewed these agreements during his time with SEP, and the final waiver agreements he signed were effective May 1, 2013. Dr. Howerton now challenges the enforceability of the waiver agreements. According to Dr. Howerton, the final agreements were vague, improperly signed, and inconsistent with CHC's bylaws. He also argued the final waiver agreements were unenforceable because they incorporated incorrect effective dates from the previous agreements. Upon examination of Dr. Howerton's employment contract, however, these challenges are moot.

Dr. Howerton's original independent contractor agreement with SEP specifically stated:

> Upon termination of this Agreement, Physician acknowledges and agrees that unless otherwise requested in writing by Facility(ies), Physician's privileges to provide Services at Facility(ies) and Facility(ies) medical staff membership shall immediately terminate without recourse.

Dr. Howerton did not challenge the effect of this contract language, which plainly demonstrated Dr. Howerton's intent to relinquish his medical staffing privileges at CHC absent a written request from CHC to allow his privileges to remain in force. And, there is no evidence that CHC provided such a written request. To the extent Dr. Howerton's affiliation with SEP was the only reason CHC allowed him to provide care in its facilities, Dr. Howerton's medical staffing privileges at CHC terminated 120 days after SEP notified him that they were terminating his employment.

3. The facts do not support Dr. Howerton's tort claims

At the trial level, Dr. Howerton claimed CHC tortiously interfered with his employment contract. He then anchored two derivative claims, one against SEP for aiding and abetting and another against SEP and CHC jointly for civil conspiracy, to this alleged tortious interference. Dr. Howerton also added a claim against CHC for negligently hiring Connie Smith. Based on applicable law, summary judgment was appropriate with respect to these claims.

"One is liable for tortious interference with an existing contract when he wrongfully induces a third party not to perform a contract . . . ." *Brett v. Media General Operations, Inc.*, 326 S.W.3d 452, 459 (Ky. App. 2010). In other words, the plaintiff bears the burden of proving the defendant acted "maliciously or engaged in wrongful conduct" in causing the third party who contracted with the plaintiff to breach the contract. *Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC*, 182 S.W.3d 529, 534 (Ky. App. 2005). A defendant acting in good faith to protect a legitimate interest, however, does not face liability for tortious interference. *Bourbon County Joint Planning Com'n v. Simpson*, 799 S.W.2d 42, 45 (Ky. App. 1990). This is so even if the plaintiff is able to show the defendant harbored an attendant motive to spite him. *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 859 (Ky. 1988)(quoting Prosser and Keeton on Torts § 130 (W.P. Keeton ed. 5th ed. 1984)).

Here, Dr. Howerton's allegations, when accepted as true, cannot establish a *prima facie* claim of tortious interference. Although there is ample evidence CHC

no longer wanted him to work in its emergency rooms, including a clear directive from Connie Smith to that end, CHC did not wrongfully induce SEP to terminate Dr. Howerton's employment. On the contrary, Dr. Howerton admitted SEP offered him an opportunity to continue the employment relationship at a non-CHC facility. Dr. Howerton was not confined to work in a CHC facility under the terms of his contract, and Dr. Presley similarly had no obligation to exclusively schedule him in a CHC emergency department. Furthermore, had there been evidence CHC induced SEP to ultimately terminate Dr. Howerton's contract, the friction between CHC's brass and its former Medical Director over who was eligible to receive treatment in CHC's emergency departments was insufficient to prove CHC acted maliciously. CHC had a legitimate business interest in setting its own admittance policies and would have been acting to protect that interest, not solely to spite Dr. Howerton.

Because Dr. Howerton has not alleged sufficient facts to establish a tortious interference claim, Dr. Howerton's civil conspiracy claim must fail. *See James v. Wilson*, 95 S.W.3d 875, 897-98 (Ky. App. 2002) (commission of a tortious or unlawful act required for liability to attach based on a civil conspiracy theory). Moreover, since Kentucky law does not recognize a distinct civil action for aiding and abetting tortious interference with contractual relations, nor does it generally impute liability to one who knowingly facilitates another's tortious conduct in the absence of a fiduciary relationship, *see Steelvest, Inc.*, 807 S.W.2d at 485 (Ky.

1991), summary judgment as to SEP's role in the alleged interference with Dr. Howerton's employment contract was proper.

Finally, as Dr. Howerton has failed to allege even a slight connection between CHC's decision to hire Connie Smith and SEP's decision to terminate Dr. Howerton's contract, his negligent hiring claim cannot survive. To succeed on a negligent hiring claim, a plaintiff must show an employer acted unreasonably in selecting or retaining its employees. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 732 (Ky. 2009). We cannot say CHC's decision to hire Connie Smith to lead its operation was unreasonable simply because she later instructed SEP to stop scheduling Dr. Howerton in CHC's emergency departments. A third party employed Dr. Howerton, and he was able to treat patients at CHC as an independent contractor through his relationship with SEP. Dr. Howerton was no longer the Medical Director of CHC's Bowling Green emergency department; CHC's business decisions were accordingly for Connie Smith to make—not Dr. Howerton. The judgments of the Warren Circuit Court are hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen L. Hixson
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

W. Currie Milliken
Bowling Green, Kentucky

Murry A. Raines
Bowling Green, Kentucky

E. Kenly Ames
Bowling Green, Kentucky