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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1870

Ambor Corporation d/b/a Hanson Medical Center Pharmacy, Inc.,
Appellant,

vs.

Allina Medical Group n/k/a Allina Medical Clinic, et al.,
Respondents.

Filed August 12, 2008
Affirmed
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-CV-06-1762

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Considered and decided by Worke, Presiding Judge; Lansing, Judge; and Muehlberg, Judge.

U N P U B L I S H E D O P I N I O N

MUEHLBERG, Judge

On appeal from the district court's order granting summary judgment in favor of respondents in this breach-of-lease dispute, appellant tenant argues that (1) respondents

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

have abandoned their summary judgment claims on certain counts alleged in the complaint; (2) there are material fact questions regarding interpretation of the lease agreement; (3) respondents' admission that they are engaged in a joint enterprise and joint venture makes them jointly and severally liable for damages due to breach of the lease, or that this is at least a question for the jury; (4) the district court erred in finding that there were no genuine issues of material fact regarding appellant's claims that the doctrine of piercing the corporate veil applies to respondents; (5) respondents have breached the covenant of good faith and fair dealing; and (6) respondents have interfered with appellant's prospective business relations. Because appellant's arguments are largely based on speculation and mere assertion, we conclude that the district court did not err in granting summary judgment to respondents in this case.

FACTS

Effective June 1, 1985, appellant Ambor Corporation, d/b/a Hanson Clinic Pharmacy Inc., leased space at the Coon Rapids Medical Center (the center) from Comprehensive Medical Care, P.A. to operate a pharmacy. The lease was for a five-year term with up to four additional consecutive five-year option periods at Ambor's discretion. Ambor has exercised all of its extension options under the lease; the current lease term will expire in 2010.

Respondent Allina Medical Group, n/k/a Allina Medical Clinic (AMC), purchased the center from Comprehensive Medical Care in 1996, subject to the obligations and liabilities of the landlord under Ambor's lease. AMC is a wholly-owned subsidiary of respondent Allina Health System, Inc. (AHS). AHS is a nonprofit system of hospitals,

clinics, pharmacies, and other health-care services with a large and extensive corporate structure.

Section 15 of the lease contains a non-compete provision entitled "Other Pharmacies." It provides that:

> Landlord agrees that it will not own, operate, or engage in, directly or indirectly, the sale or distribution of pharmaceutical drugs by prescription at this location. Landlord further agrees that it will not lease or make space available to any business engaged in the sale or distribution of pharmaceutical drugs by prescription, in the Building or at any other location within two miles of the Building which is owned in whole or in part or otherwise controlled by Landlord. The foregoing covenants shall be effective for the entire term of this lease and any extensions thereof.

The lease does not include any definitions of terms.[1]

AHS offers eligible employees and their families, including those of its subsidiary companies like AMC, a benefit program providing insurance coverage for prescription drugs and certain other pharmaceutical supplies. The program is not available to the public. While employees under the plan may fill their prescriptions at any pharmacy in the United States, the most cost-effective method to obtain prescription drugs under the

[1]AHS operates Unity Community Pharmacy (Unity) in Fridley, MN. It does not appear that Unity is affiliated with the center or operated by AMC. Ambor asserted in its amended complaint that because Unity is within two miles of the center, there is a breach of the lease by both AMC and AHS. The district court's June 2007 order states that "[t]he parties agree that there is a factual dispute as to whether an AHS owned pharmacy in nearby Fridley, Minnesota is within 2 miles of the Center." The district court then stated that "[i]n short, if such pharmacy were actually owned by AMC (as opposed to its parent, AHS), there would undoubtedly be an issue of fact regarding the exact location of such pharmacy and the manner the 2-mile lease restriction is to be calculated." While Ambor continues to mention Unity throughout its brief, it appears to focus more on the "sale or distribution" component of section 15 of the lease and does not appear to make a clear assignment of error regarding the district court's decision on this point.

plan is by using an AHS pharmacy or AHS pharmacy mail-order or online program. Employee prescriptions filled through the mail-order or online options are filled at an AHS pharmacy in St. Paul. The co-pay differential for employees purchasing their prescriptions from an AHS pharmacy, i.e., the value of the benefit, increased from between $5 to $25 to between $10 and $41 in 2005, depending on the type and amount of the prescribed medication the employee purchases. AHS indicates that "[s]ome AMC employees located at the Center participate in this program," though it is not clear from the record how many. It is also not clear how many AMC employees who are also patients at the center have discontinued or chosen not to use Ambor's pharmacy due to the AHS prescription drug benefit.

In early 2006, reacting to the increased value of the AHS employee prescription drug benefit program, Ambor commenced this action to enforce section 15 of the lease. Ambor alleged six counts in its amended complaint: (1) breach of contract against both AMC and AHS for indirectly distributing prescription drugs via the employee prescription drug benefit program; (2) breach of contract against both AMC and AHS for operating Unity Pharmacy within two miles of Ambor's pharmacy; (3) breach of contract against AMC and AHS based on agency or alter-ego theories; (4) breach of the implied covenant of good faith and fair dealing; (5) interference with prospective business advantage; and (6) temporary or permanent injunctive relief. AMC and AHS moved for summary judgment on all counts, although their summary-judgment memorandum only addressed alter-ego liability and application of the doctrine of laches. The district court granted partial summary judgment to AHS and AMC, but requested simultaneous

supplemental briefing from both parties on "the First Cause of Action against Defendant AMC and the Fourth and Fifth Causes of Action against both Defendants given [the] Court's [grant of summary judgment] regarding piercing the corporate veil." After consideration of the parties' supplemental filings, the district court granted summary judgment to AMC and AHS on all counts. This appeal followed.

D E C I S I O N

On appeal from summary judgment, this court asks "(1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). This court "view[s] the evidence in the light most favorable to the party against whom judgment was granted." *Id*.

No genuine issue of material fact exists when "the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (stating that "[a] party need not show *substantial evidence* to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party

has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions").

I.

As an initial matter, Ambor's repeated assertions that AMC and AHS abandoned their summary judgment claims on several of the allegations in Ambor's complaint, and that the district court erred in requesting supplemental briefing to address those claims, are without merit.

Our review of the record reveals that AMC and AHS have not abandoned any of their claims, and that the district court's request for supplemental briefing was not improper under Minn. R. Gen. Pract. 115.03 and Minn. R. Civ. P. 56.03. *See Smith v. Brutger Cos.*, 569 N.W.2d 408, 412-13 (Minn. 1997) (concluding that the district court did not err in asking the parties for additional argument on a remaining claim where respondents moved for summary judgment on all four claims alleged in the complaint, seeking to have the entire lawsuit dismissed, but its supporting memoranda addressed only three of the four claims).

II.

We further conclude that the district court properly granted summary judgment to AMC and AHS on all of Ambor's claims.

a. Interpretation of the lease agreement

The district court's June 2007 order states "that there is no evidence of a breach [of section 15 of the lease], direct or indirect." The order further states that "[t]he closest argument that can be made is that AMC somehow engaged in the *indirect* distribution of

pharmaceuticals when AHS implemented its medical benefits plan by extending pharmaceutical benefits to AMC employees in the Center." But the court found that "even if the 'indirect' and 'distribution' requirements could be established (and they have not), Ambor has failed to establish that any such distribution was 'by prescription' or that such distribution took place at 'this location'—that is, the Center."

1. Ambiguity

Ambor argues that the terms "indirect" and "distribution" make section 15 of the lease ambiguous, and that the application of the facts to these contractual terms therefore becomes an issue for the jury to decide, citing *Dunn v. Nat'l Beverage Corp.*, 729 N.W.2d 637, 644 (Minn. App. 2007).

Ambor did not raise this argument before the district court—despite the court's clear request for the parties to "address in their [supplemental] memoranda whether AMC's extension of health or pharmaceutical benefits to its employees working at the Coon Rapids Medical Center violates the first sentence of the non-compete clause of the lease." Therefore, we conclude that Ambor has waived this argument on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court will generally not consider matters not argued and considered in the court below).

2. Genuine issues of material fact

Ambor's claim that it "provided factual evidence, confirmed by AMC and AHS in their submissions, that the prescription could be ordered and filled online from within the [] Center," is without merit. Ambor cannot dispute that it operates the only retail pharmacy at the center location. Simply because AMC employees may order a

prescription online from their desk within the center does not mean that AMC is indirectly distributing prescription drugs at the center, and Ambor does not cite any authority to support this proposition. "[S]urmise and speculation" cannot be relied on in meeting the burden of showing a genuine issue as to a material fact. *Fownes v. Hubbard Broad., Inc.*, 302 Minn. 471, 474, 225 N.W.2d 534, 536 (1975). "[T]he adverse party cannot preserve his right to a trial on the merits merely by referring to unverified and conclusionary allegations in his pleading or by postulating evidence which might be developed [during the course of trial]." *Rosvall v. Provost*, 279 Minn. 119, 124, 155 N.W.2d 900, 904 (1968).

Furthermore, common sense seems to dictate that this was not the type of behavior section 15 was intended to prohibit. There is no indication in the record that AMC or AHS is actually in competition with Ambor for pharmacy business at the center. There is no indication in the record of the number of AMC or AHS employees that are patients at the center and who utilize Ambor's pharmacy. Because there are no genuine issues of material fact regarding interpretation of the lease, the district court's grant of summary judgment on this claim was proper.

b. Joint and several liability based on joint enterprise or joint venture

There is also no merit to Ambor's claims that because AMC and AHS operate as a joint venture or joint enterprise, AMC and AHS should be jointly and severally liable for the acts of the joint venture or joint enterprise.

Ambor first made this argument in its supplemental memoranda requested by the district court. Ambor did not plead joint venture or joint enterprise in its complaint, and

only alleged AHS's liability for AMC's actions under the lease based on agency theory generally and the alter-ego theory of piercing the corporate veil. On appeal, Ambor argues that its joint-venture or joint-enterprise claims should survive because it properly pleaded, under Minn. R. Civ. P. 8, a claim based on agency. Specifically, Ambor notes that paragraph 43 of the complaint states that "[b]y reason of this agency relationship, and/or because Allina Medical has acted as the alter ego of Allina Health System, Allina Medical's actions and obligations are attributable to Allina Health System." Ambor asserts that it learned of the full operational effect—alleged joint enterprise or joint venture—of Allina and Allina pharmacies only after discovery was completed.

However, AMC and AHS argue that because Ambor did not allege its joint-venture or joint-enterprise argument in the complaint, the argument is improper and must be rejected. *See Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 233-34, 67 N.W.2d 400, 403 (1958) (stating that a party "is bound by the pleadings unless the other issues are litigated by consent"); *see also Great Am. Ins. Co. v. Golla*, 493 N.W.2d 602, 605 (Minn. App. 1992) (stating that a party cannot raise a claim simply by asserting it in opposition to summary judgment). We agree. Ambor could have moved to amend its pleadings and assert joint-enterprise or joint-venture theories pursuant to Minn. R. Civ. P. 15 after it learned of "the full operational effect of [AMC and AHS]," but it did not. Therefore, because Ambor's argument is not contained in its pleadings, the district court did not err by not addressing it.

Ambor further argues, however, that the district court erred in granting summary judgment because the joint-venture issue is a fact question that must be submitted to the

jury. This contention is partially correct. The existence of a joint venture ordinarily presents an issue of fact, but the district court may decide the issue as a matter of law if there is no competent evidence to support a finding of joint venture. *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 389-90 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). The party claiming that a business relationship is a joint venture must demonstrate four elements:

> (a) *Contribution*–the parties must combine their money, property, time, or skill in some common undertaking, but the contribution of each need not be equal or of the same nature.
>
> (b) *Joint proprietorship and control*–there must be a proprietary interest and right of mutual control over the subject matter of the property engaged therein.
>
> (c) *Sharing of profits but not necessarily of losses*–there must be an express or implied agreement for the sharing of profits *(aside from profits received in payment of wages as an employee)* but not necessarily of the losses.
>
> (d) *Contract*–there must be a contract, whether express or implied, showing that a joint adventure was in fact entered into.

Rehnberg v. Minn. Homes, Inc., 236 Minn. 230, 235-36, 52 N.W.2d 454, 457 (1952) (footnotes omitted).

Ambor argues that AMC and AHS are clearly engaged in a common undertaking because they each have a say in the operations of Allina and Allina pharmacy, and because they share profits by running AMC at a loss, leaving profits for AHS, then transferring those profits back AMC annually to keep it solvent. But even if this court were to conclude that this question should be submitted to a jury, Ambor's claim would fail. Ambor does not cite to any specific evidence showing a contract, express or

implied, between AMC and AHS to operate as a joint venture. Ambor's assertions of a joint venture illustrate aspects of AMC and AHS's parent-subsidiary relationship; Ambor has not made any showing to establish that AMC and AHS operate instead as a joint venture. Therefore, the district court did not err by not addressing Ambor's joint-venture or joint-enterprise claims or by not submitting them to a jury.

c. Piercing the corporate veil

This court has concluded that

> Generally, absent fraud or bad faith, a corporation will not be held liable for the acts of its subsidiaries. There is a presumption of separateness the plaintiff must overcome to establish liability by showing that the parent is employing the subsidiary to perpetrate a fraud and that this was the proximate cause of the plaintiff's injury. [] The main point is that, although corporations are related, there can be no piercing of the veil without a showing of improper conduct.

Ass'n of Mill & Elevator Mut. Ins. Co. v. Barzen Int'l, Inc., 553 N.W.2d 446, 449 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. Nov. 20, 1996). For purposes of examining whether piercing the corporate veil is appropriate in the parent-subsidiary relationship, this court applies the factors outlined in *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979), including:

> insufficient capitalization for purposes of corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation at time of transaction in question, siphoning of funds by dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of corporation as merely facade for individual dealings.

Additionally, there must "be an element of injustice or fundamental unfairness" to warrant piercing the corporate veil. *Victoria Elevator*, 283 N.W.2d at 512.

Ambor argues that the district court improperly invaded the province of the jury by applying disputed material facts to the *Victoria Elevator* factors, a function usually reserved to the jury. Ambor argues that material fact questions are created by (1) AHS's infusions of funds to AMC in 2001 through 2004, and infusions of funds generally to keep AMC afloat, which it argues establish insufficient capitalization and nonpayment of dividends; (2) AMC and AHS's shared board of directors; (3) AMC's continued operation at a loss─amounting to siphoning of funds; (4) the fact that AHS officers have complete control of the operations of AMC; (5) the lack of corporate records for AMC since 2004; and (6) analysis by the tax court in an unrelated case which Ambor argues establishes that AMC is a mere instrumentality of AHS. Ambor also argues that it meets the unfairness element of the *Victoria Elevator* test for purposes of summary judgment because "[t]he intent of the Allina drug benefit plan to 'direct' all of the AMC and AHS employee (26,000+) drug purchases to Allina Pharmacies raises issues of injustice or fundamental unfairness."

To defeat a motion for summary judgment, the nonmoving party must present affirmative, probative evidence tending to support every essential element of the party's cause of action. *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989) (citations omitted). If Ambor is able to produce or has produced evidence that AMC has not been able to meet its financial obligations and is therefore insufficiently capitalized or insolvent, or evidence of the other *Victoria Elevator* factors, it is not clear

in the record where that evidence is to be found. Additionally, based on the parent-subsidiary relationship between AMC and AHS, it seems acceptable that there would be some overlap of corporate formalities and governance. The fact that the two companies share a board of directors is not enough to warrant piercing the corporate veil. *See, e.g.*, *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988) (stating that it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts).

Overall, Ambor has not presented sufficient evidence to survive summary judgment as to this claim, and therefore the district court's decision was not in error.

d. Covenant of good faith and fair dealing

The covenant of good faith and fair dealing ordinarily will be implied between the parties to a contract. *In re Hennepin County 1986 Recycling Bond Litigation*, 540 N.W.2d 494, 502 (Minn. 1995). When parties take action with respect to a contract, this covenant bars a party from unjustifiably hindering the other party's performance. *Id.*

The district court concluded that "[i]n the instant case, the parties expressly articulated the extent of the non-compete provision in the Lease, and the covenant of good faith and fair dealing cannot therefore be used to extend the scope of the non-compete provisions therein." Minnesota law does not recognize a separate cause of action for breach of the implied covenant of good faith when it arises from the same conduct as a breach-of-contract claim. *Wild v. Rarig*, 302 Minn. 419, 441-42, 234 N.W.2d 775, 790 (1975).

In *Hennepin County 1986 Bond Recycling Litigation*, the supreme court stated:

> In Minnesota, the implied covenant of good faith and fair dealing does not extend to actions beyond the scope of the underlying contract. Here, however, the bondholders' implied covenant claims are based on the underlying bond agreements. To allege an implied covenant claim the bondholders need not first establish an express breach of contract claim—indeed, a claim for breach of an implied covenant of good faith and fair dealing implicitly assumes that the parties did not expressly articulate the covenant allegedly breached.

540 N.W.2d at 503. Here, unlike in *Recycling Litigation*, Ambor's claim that AMC and AHS violated the covenant of good faith and fair dealing arises from the exact same conduct as alleged in the breach-of-contract claim. Therefore, Ambor's claim regarding this issue fails, and the district court's grant of summary judgment was not erroneous.

e. Interference with prospective business relations

Lastly, Ambor argues that there are genuine issues of material fact with respect to whether AMC and AHS have intentionally interfered with the prospective business relations between Ambor and the AMC employees at the center, as well as AHS employees who are patients at the center.

Minnesota recognizes a claim for tortious interference with prospective contractual relations. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632 (Minn. 1982). The elements of the tort of intentional interference with prospective and contractual relations are defined as:

> "One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary

> harm resulting from loss of the benefits of the relations, whether the interference consists of:
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation."

United Wild Rice, 313 N.W.2d at 633 (quoting Restatement (Second) of Torts § 766B (1979)).

Ambor contends that, but for the AHS employee prescription drug benefit, "the AMC employee will pick up his/her or his/her family members' prescriptions from Ambor as he/she leaves work at the Medical Center." Ambor argues that damages from the business it loses as a result of the employee benefit plan are obvious, and that the plan "was done intentionally and for the purpose of taking business away from Ambor and other independent pharmacies and directing it to Allina Pharmacies."

But these allegations are merely speculative of a fact issue. Ambor does not offer any evidence indicating how many AMC employees have stopped being customers since AMC and AHS offered the drug benefit plan, and Ambor does not offer any specific evidence of the amount of damages it has incurred, if any. "[T]he mere general loss of possible unspecified customers does not establish the tort of intentional interference with prospective economic relations under Minnesota law." *Int'l Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1405 (8th Cir. 1993). Without more than mere allegation, no genuine issues of material fact exist regarding this claim, and the district court's grant of summary judgment was appropriate.

Affirmed.