Circuit Court for Baltimore County
Case No. 03-C-16-011064

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 924

September Term, 2017

MARYLAND INDUSTRIAL GROUP, LLC
d/b/a PREMO INDUSTRIAL CONTRACTING

v.

BLUEGRASS MATERIALS CO., LLC

Eyler, Deborah S.,
Meredith,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 15, 2018

Maryland Industrial Group, LLC d/b/a Premo Industrial Contracting ("Premo"), the appellant, challenges an order of the Circuit Court for Baltimore County granting summary judgment in favor of Bluegrass Materials Company, LLC ("Bluegrass"), the appellee. Premo presents two questions for review, which we have rephrased:

I. Did the circuit court err by treating Bluegrass's motion to dismiss or, alternatively, for summary judgment as a motion for summary judgment without first notifying Premo?

II. Did the circuit court err by dismissing Premo's claims for tortious interference with contract and tortious interference with prospective advantage?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Premo is a staffing company that provides temporary laborers to industrial businesses. Its laborers perform services such as general maintenance, mechanical work, cleaning, welding, carpentry, plumbing, and other related activities. According to Premo, it hires laborers who possess one skill and then trains them in another so that its employees are skilled in multiple trades.

In 2013, Premo hired Brian Wilson, who had experience as a general maintenance mechanic. Later that year, he left to pursue other employment, but in November 2015 Premo rehired him. In January 2016, Premo hired Christopher Hilt, who had experience welding. Wilson and Hilt both worked as laborers, performing temporary services for Premo's clients.

In 2016, Premo had its employees, including Wilson and Hilt, sign an employment contract containing the following "Non-Compete Agreement":

> I understand that while the Company employees such as myself may develop a personal relationship with some of the Company clients, those clients are and at all times shall be clients of the Company. I also understand that this non-competition section is aimed at protecting the interests of the Company in preserving the Company relationship with its clients. While I am employed by the Company, I agree not to compete with the Company directly or indirectly, whether as owner, employee, consultant of, or to become associated with any business competitive with Company. Within this section, "compete" means to participate in any business activity, which is similar to the core business activity, which I perform during my employment with the Company. For a period of twelve (12) months following the termination of my employment with Company, I agree not to compete with the Company directly or indirectly, whether as an owner, employee, consultant of otherwise, or to become associated with any business competitive with or a sub-contractor to Company, either indirectly or directly. I acknowledge that the twelve-month period following termination in which I will not compete with the Company in the market area is reasonable [sic] necessary to protect the interest of the Company in preserving the relationship with its clients.

At some point after Wilson and Hilt signed their employment contracts containing the non-compete agreement, Premo assigned them to perform work at Bluegrass (among other places).

Bluegrass is in the business of mining aggregate. Beginning in early 2014, it contracted with Premo for temporary laborers who could perform general maintenance, including changing light bulbs, cleaning up work sites, welding, and changing bearings on and reassembling mining equipment. In 2015, Bluegrass started to transition from using temporary workers to hiring its own employees. Bluegrass continued using Premo laborers during the transition period.

In July 2016, while employed by Premo, Hilt applied for a general maintenance position at Bluegrass. Bluegrass hired him. On August 22, 2016, Premo sued Hilt, alleging that he breached his employment contract by accepting employment from Bluegrass. The company claimed that the non-compete agreement in the employment contract prohibited Hilt from working for its clients, such as Bluegrass. Premo alleged that it had suffered economic and non-economic damages as a result of the breach. After Premo sued Hilt, Bluegrass threatened to terminate its relationship with Premo if it did not drop the suit. Premo did not do so, and Bluegrass stopped requesting laborers from Premo "[t]oward the end of August 2016[.]"

On October 24, 2016, after being told by Premo that it had no more work for him, Wilson also applied for a general maintenance position at Bluegrass and was hired. On November 29, 2016, Premo also sued Wilson, alleging that he breached the non-compete agreement by accepting employment from Bluegrass.

In the meantime, on October 31, 2016, in the Circuit Court for Baltimore County, Premo filed suit against Bluegrass. Its complaint set forth one count for tortious interference with contract and one count for tortious interference with prospective advantage. With respect to tortious interference with contract, Premo alleged that Bluegrass "was aware during the entirety of their relationship that [Premo and its] employees [we]re engaged in non-compete agreements" and that despite "knowing that [Premo's employees] had contracts with [Premo] [Bluegrass] intentionally, unlawfully, and wrongly, [sic] offered P[remo]'s employees employment." Premo alleged that

Bluegrass's offers of employment caused Premo's employees to "quit their jobs, [and] breach[] their employment contract with P[remo] . . . subsequently caus[ing] [Bluegrass] to stop ordering men for work which caused a reduction in income to P[remo]." Premo further alleged that Bluegrass's actions were "conducted with actual malice with intent to damage" Premo.[1]

With respect to tortious interference with prospective advantage, Premo alleged that Bluegrass "intentionally and willfully offered" employment to Premo's employees "with the unlawful purpose to cause damage and loss to" Premo. More specifically, Premo alleged that Bluegrass "knew that if P[remo]'s employees quit working for P[remo] and went to work for [Bluegrass], that P[remo]'s business would be injured because [Bluegrass] would no longer be ordering men for services." It claimed to have suffered "actual loss and injury" as a result.[2]

On March 16, 2017, Bluegrass filed a "Motion to Dismiss P[remo]'s Complaint, or, in the Alternative, for Summary Judgment." It argued that Premo's allegations failed to state a claim for tortious interference with contract because 1) the non-compete

[1] Premo alleged that Bluegrass "has a habit of offering jobs to P[remo]'s employees[,]" and accused it of offering permanent employment to four other Premo employees (in addition to Hilt and Wilson).

[2] On November 30, 2016, Bluegrass sought to remove the case to the United States District Court for the District of Maryland. On February 2, 2017, the Honorable Catherine C. Blake remanded the case back to the circuit court, which reopened the case on February 8, 2017.

agreement did not prohibit Premo employees from working for Bluegrass because Bluegrass, a mining company, was not in competition with Premo, a temporary worker staffing company; and 2) the non-compete agreement in Premo's employment contracts was not enforceable and one cannot tortiously interfere with an unenforceable contract. Bluegrass further argued that Premo had not stated a "viable tortious interference of prospective advantage claim because P[remo] does not allege facts to establish that Bluegrass ended its business relationship with P[remo] for tortious reasons." Bluegrass attached to its motion the portion of the contracts containing the "Non-Compete Agreement" and affidavits by Hilt, Wilson, and James Heckler, its district operations manager.

On March 30, 2017, Premo filed an opposition to Bluegrass's motion to dismiss or for summary judgment. It argued that it sufficiently pleaded the elements of a tortious interference with contract claim and that whether the contract at issue was enforceable was immaterial as it only had to be facially valid. Premo also argued that it sufficiently pleaded a tortious interference with prospective advantage claim because it alleged that Bluegrass "intentionally hired away Premo's employees in an effort to hurt Premo's business . . . ." Premo argued that summary judgment would not be proper because "there is a dispute as to a material fact" and because it needed the opportunity to produce additional evidence. Premo did not clearly identify what material facts were in dispute but did assert that the parties disagreed over the validity of the non-compete agreement.

Bluegrass filed a reply to Premo's opposition. In addition to restating some of the arguments it made in its motion, Bluegrass asserted that Premo's response to its motion for summary judgment was deficient because Premo did not "identify with particularity each [disputed] material fact" and did not file an affidavit or supporting documents, as required by Rule 2-501(b). Bluegrass noted that Premo did not explain why it needed more time to collect evidence, when it could have submitted affidavits by its own witnesses.

Meanwhile, on March 22, 2017, Bluegrass, Hilt, and Wilson filed a motion to consolidate Premo's suits against them and to stay discovery. Premo opposed that motion. On May 17, 2017, the court granted the joint motion to consolidate, opining "that there is a commonality of questions of law and fact focusing on an agreement between [Premo] and Messrs. Hilt and Wilson and whether there was a breach of the . . . non-competition clauses in those agreements." It does not appear from the record that a ruling was made regarding the stay of discovery. No parties conducted discovery, however.[3]

On June 20, 2017, the court held a hearing on Bluegrass's motion to dismiss or for summary judgment. Premo argued that the hearing should be confined to the motion to dismiss, as it "need[ed] to be notified by the Court whether or not it's gonna [sic] treat [Bluegrass's motion] as [one for] summary judgment . . . ." In response, the court,

[3] At a later date, Premo's claims against Hilt and Wilson were dismissed.

referencing Rule 2-322(c), stated: "Let's just be clear, I don't know that the Court has to notify you." Premo also asserted that it needed to engage in discovery to determine whether a manager at Bluegrass knew about the non-compete agreements before Bluegrass hired Hilt and Wilson.

The court questioned Premo about its argument that it only needed to prove that the non-compete agreement was facially valid to move forward with its tortious interference with contract claim:

> THE COURT: [L]et's assume for the moment that [the contract] is [valid]—did the employees breach the contract by going to work for [Bluegrass]?
>
> [Premo's Counsel]: Yes.
>
> THE COURT: How?
>
> [Premo's Counsel]: I don't think as far as the analysis goes that it matters, I think what matters is the intent of the third party to induce the employees to come and work for them in terms of the elements that we're required to meet for tortious interference.

The court then focused in on whether the language of the non-compete agreement prohibited Premo employees from being hired by Bluegrass. Premo's counsel explained that although Bluegrass and Premo are not competitors, Hilt and Wilson were performing the same type of work for Bluegrass that they performed for Premo (welding, metal fabrication, etc.). He argued that the non-compete agreement defines "compete" to mean the performance of a "core business activity" that an employee performs at Premo and, under that definition, Hilt and Wilson breached the non-compete agreement by going to

work for Bluegrass and performing the same types of tasks there that they had performed while working as a staffing laborer for Premo.

After the parties presented their arguments, the court ruled. Although the court said that it was granting summary judgment, it explained its ruling as follows:

> To the extent that this Court is relying on papers outside the four corners of the initial complaint, the Court would say, yes, only to the extent that it is relying on the contract, not the other documents attached[.] The bottom line is whether or not [Bluegrass] in some way or another is subject to and whether or not the third parties are subject to and have violated the non-compete clause in the contract that was drawn up on behalf of [Premo]. . . .
>
> When I read the non-competition clause, the clause places upon Premo's employees not only a duty of loyalty, . . . but that they have agreed not to compete with the company, that is Premo, directly or indirectly, whether as an owner, employee, consultant or otherwise, or become associated with any business competitive with or subcontractor to the company either directly or indirectly. Quite frankly, I do not find that these Defendants violated that term of the contract. . . .
>
> While I appreciate P[remo]'s argument that this non-competition clause clearly establishes that the employee should not have been able to work for the client, I can't agree given the wording of this contract. I am bound by the wording of the contract. It is not ambiguous, it is not subject to question, the words are the words that appear on the contract, and I find that they just did not violate it and, therefore, the claims . . . must fail, and judgment will be entered on behalf of [Bluegrass].

On June 23, 2017, the court entered an order granting Bluegrass's motion for summary judgment, but also dismissing the case with prejudice. On July 6, 2017, Premo timely filed its notice of appeal.

DISCUSSION

I.

The first issue is procedural. Premo contends the circuit court erred by granting summary judgment without providing Premo notice so it could present material to counter the material Bluegrass attached to its motion. Bluegrass responds that although the court stated that it was granting the motion for summary judgment, it actually granted the alternative motion to dismiss, because the only material outside the complaint that it considered was the non-compete agreement, which was referenced in the complaint. Alternatively, Bluegrass argues that the court was not required to notify Premo that it was resolving the matter by summary judgment. Premo was on notice that the court could rule on the motion for summary judgment; Premo had ample opportunity to present material to the court; and the court based its decision on the non-compete agreement, which all parties agreed was the actual agreement.

We agree with Bluegrass that the court effectively disposed of this case by granting a motion to dismiss, notwithstanding its comment that it was granting summary judgment in Bluegrass's favor. As noted, Bluegrass's motion was to dismiss or in the alternative for summary judgment. The request to dismiss was on the ground that the complaint "fail[ed] to state a claim upon which relief can be granted." Md. Rule 2-322(b)(2).

Where materials beyond the complaint are provided in support of a motion to dismiss or for summary judgment, it "is proper for [the] trial court to decide [the] motion

to dismiss," and not decide the motion for summary judgment, "when the court considers, or does not exclude, materials that are central to the allegations in the complaint." *Heneberry v. Pharoan*, 232 Md. App. 468, 476 (2017). In *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164 (2015), for example, Advance Telecom Process, LLC ("Advance") sued DSFederal, Inc. ("DSFederal") for breaching a Teaming Agreement. DSFederal filed a motion to dismiss, attaching the Teaming Agreement as an exhibit. The court granted DSFederal's motion to dismiss on the ground that the teaming agreement was unenforceable. On appeal, we determined that the court correctly treated the motion as one to dismiss, and not as one for summary judgment, explaining:

> [A]s a general proposition, . . . where matters outside of the allegations in the complaint and any exhibits incorporated in it are considered by the trial court, a motion to dismiss generally will be treated as one for summary judgment. . . . *Where, however, a document such as the Teaming Agreement merely supplements the allegations of the complaint, and the document is not controverted, consideration of the document does not convert the motion into one for summary judgment*. . . . Accordingly, the circuit court's consideration of the Teaming Agreement did not convert the motion to dismiss into a motion for summary judgment.

Id. at 175 (emphasis added) (citations omitted).

Here, Bluegrass filed a motion to dismiss *or* for summary judgment and attached the non-compete agreement and other materials. The non-compete agreement formed the entire basis for Premo's claims against Bluegrass. The court made clear that although several documents were attached to Bluegrass's motion, the only document it was considering in ruling on Bluegrass's motion was the non-compete agreement. The court's ruling, which was based on the language of the agreement, was not the grant of a

motion for summary judgment. The court made its ruling based solely on the pleadings, not on "matters outside the pleading," Rule 2-322(c), because a contract that forms the basis of claims alleged is not a "matter[] outside" the pleadings. Moreover, the basis for granting the motion was that Premo's complaint did not state a claim for which relief could be granted, as discussed below. Accordingly, the circuit court disposed of Bluegrass's motion by granting its motion to dismiss. Because summary judgment was not granted, Premo's procedural arguments about notice and the need for discovery are immaterial.

II.

Our standard of review in an appeal from an order granting a motion to dismiss is *de novo*; we decide whether the decision to grant the motion was legally correct. *Heneberry*, 232 Md. App. at 477–78; *Hrehorovich v. Harbor Hosp. Ctr. Inc.*, 93 Md. App. 772, 785 (1992).

(a)

The circuit court ruled that on the facts alleged, Premo did not state a claim for tortious interference with the non-compete agreements it had with Hilt and Wilson. It reasoned that Hilt and Wilson could not have breached their non-compete agreements by going to work for Bluegrass because Bluegrass was not Premo's competitor. The court did not rule on the validity or enforceability of the non-compete agreement.

Premo contends the circuit court "glossed right over" the material issues of whether the non-compete agreements were facially valid and whether Bluegrass knew of

them when it hired Hilt and Wilson and "simply held that no one breached the contracts[.]" Premo maintains that "[a] breach simply has no bearing on whether [Bluegrass] tort[i]ously interfered with a contract."

Bluegrass responds that the court correctly ruled that it could not have interfered with Premo's non-compete agreements with Hilt and Wilson because those agreements did not prohibit them from working for Bluegrass. Alternatively, Bluegrass argues that the non-compete agreements were unenforceable, because restrictive covenants cannot be applied to workers without a unique skillset and because the non-compete agreements were overly broad, and one cannot tortiously interfere with an unenforceable contract, even if it is a valid contract.

There are five elements to a claim for tortious interference with contract: "(1) existence of a contract between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional interference with that contract; (4) *breach of that contract by the third party*; and (5) resulting damages to the plaintiff." *Fowler v. Printers II, Inc.*, 89 Md. App. 448, 466 (1991) (citing *K & K Mgmt. v. Lee*, 316 Md. 137, 155–56 (1989)) (emphasis added). Thus, for Premo to succeed in such a claim against Bluegrass, it would need to prove that Hilt and/or Wilson—the third parties in this scenario—breached their non-compete agreements. For that reason, there is no merit to Premo's assertion that whether Hilt and Wilson breached their non-compete agreements is irrelevant.

The pertinent language of the non-compete agreement provides:

> While I am employed by the Company, I agree not to compete with the Company directly or indirectly, whether as owner, employee, consultant of, or to become associated with any business competitive with Company. Within this section, "compete" means to participate in any business activity, which is similar to the core business activity which I perform during my employment with the Company.

As alleged in the complaint, Premo's employees, including Hilt and Wilson, provided a variety of temporary labor services to Premo's clients. The circuit court considered the language of the non-compete agreement, found that it was unambiguous, and further found that it did not prohibit Hilt and Wilson from becoming employed by Bluegrass. "I do not find that [Hilt or Wilson] violated th[e non-compete clause in] the contract." We agree.

"Maryland adheres to the principle of the objective interpretation of contracts. . . . If the language of a contract is unambiguous, we give effect to its plain meaning and do not contemplate what the parties may have subjectively intended by certain terms at the time of formation." *Cochran v. Norkunas*, 398 Md. 1, 16 (2007) (citations and footnotes omitted). Accordingly, we must determine how a reasonable person in the position of the parties would have interpreted the contract. *Ocean Petroleum, Co., Inc. v. Yanek*, 416 Md. 74, 86 (2010) (quoting *Cochran*, 398 Md. at 17). In addition, we determine contractual ambiguity by asking "if, when read by a reasonably prudent person, [the language] is susceptible of more than one meaning." *Calomiris v. Woods*, 353 Md. 425, 436 (1999) (citing *Heat & Power v. Air Prod. & Chem., Inc.*, 320 Md. 584, 596 (1990)). "'The interpretation of a contract, including the determination of whether a contract is

ambiguous, is a question of law,' which we review de novo." *Ocean Petroleum*, 416 Md. at 86 (quoting *Clancy v. King*, 405 Md. 541, 556–57 (2008)).

The language of the non-compete agreement in this case is not ambiguous. A reasonable person would understand it to prohibit a Premo employee who Premo contracts out to perform temporary labor services for others from going to work in the same capacity for another company that provides temporary labor services. The agreement prohibits employees from going to work for a business that is "competitive" with Premo and defines "compete" as participating in a business activity that is similar to the "core business activity" that the employee performs for Premo. The term "core business activity" is not expressly defined in the contract, but when read in the context of the term it defines—"compete"—and the type of work Hilt and Wilson carried out the only reasonable interpretation of Hilt's and Wilson's "core business activity" is the activity of working as a temporary laborer for a staffing company.

Because the non-compete agreement only prohibited Hilt and Wilson from going to work for a company that provides temporary labor services to clients, they could not have breached the non-compete agreement by being hired as fulltime labor workers for Bluegrass, a mining company. Therefore, on the facts alleged in the complaint, Bluegrass could not have induced Hilt and Wilson to breach their contract with Premo by hiring them. A claim for tortious interference with contract must fail in the absence of a breach by the third party. Accordingly, regardless of whether the non-compete

agreement was enforceable, the circuit court correctly dismissed Premo's claim for tortious interference with contract.

(b)

Premo's second claim against Bluegrass was for tortious interference with prospective advantage, also called wrongful interference with economic relationship. In its brief, Premo does not offer an independent argument concerning this claim but treats it as one and the same as the tortious interference with contract claim. Bluegrass argues that the tortious interference with prospective advantage claim was properly dismissed because, in its complaint, Premo failed to allege any tortious or wrongful conduct on Bluegrass's part that would have been the basis for such a claim.

Tortious interference with prospective advantage occurs when a party "maliciously or wrongfully infringes upon an[other]'s economic relationship." *Macklin v. Robert Logan Assocs.*, 334 Md. 287, 297 (1994). The tort differs from tortious interference with contract in that one need not prove that the interference induced a breach of contract, as there need not be a contractual relationship between the purported tort-victim and a third party or, if there is, the contractual relationship can be terminable at will. *Id.* at 299 ("[A] contract terminable at will is more closely akin to the situation where no contract exists."). The Court of Appeals has recognized "'[a] broader right to interfere with economic relations . . . where no contract or a contract terminable at will is involved.'" *Id.* at 298 (quoting *Nat. Design, Inc. v. Rouse Co.*, 302 Md. 47, 69–70 (1984)).

Tortious interference with prospective advantage "requires 'both a tortious intent and improper or wrongful conduct.'" *Alexander & Alexander Inc. v. B. Dixon Evander & Assocs., Inc.*, 336 Md. 635, 656 (1994) (quoting *Macklin*, 334 Md. at 301). It is not sufficient to prove that the defendant intended to harm the plaintiff or to benefit himself or herself at the expense of the plaintiff. *Id.* The plaintiff also must prove that the interference was "through improper or wrongful means." *Id.* (citing *Macklin*, 334 Md. at 302). To state it differently, tortious interference with prospective advantage is "interference by conduct that is *independently wrongful or unlawful*, quite apart from its effect on the plaintiff's business relationships." *Id.* at 657 (emphasis added). These wrongful or unlawful acts include "common law torts[,] 'violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.'" *Id.* (quoting *K & K Mgmt.*, 316 Md. at 166). Actual malice, "in the sense of ill will, hatred or spite, may be sufficient to make an act of interference wrongful where the defendant's malice is the primary factor that motivates the interference." *Id.* (citing cases). This is "a heavy burden," however, because animosity that is "incidental" to "legitimate commercial goals" cannot sustain the tort. *Id.* at 658.

Before dismissing Premo's claim for tortious interference with prospective advantage, the circuit court explained that Premo was required to allege facts demonstrating that Bluegrass acted unlawfully. By dismissing the claim, the court implicitly found that Premo failed to make sufficient factual allegations.

In its complaint, under the count for tortious interference with prospective advantage, Premo stated,

> 65. [Bluegrass] was aware that P[remo]'s employees had employment contracts with P[remo].
>
> 66. [Bluegrass] intentionally and willfully offered employees of P[remo] full time jobs.
>
> 67. [Bluegrass] offered employment which was calculated to cause damage to [Premo].
>
> 68. [Bluegrass] offered employment with the unlawful purpose to cause damage and loss to P[remo].
>
> 69. [Bluegrass] knew that if [Premo]'s employees quit working for P[remo] and went to work for [Bluegrass], that P[remo]'s business would be injured because [Bluegrass] would no longer be ordering men for services.

The crux of Premo's allegations is that Bluegrass hired Hilt and Wilson with the intention of harming Premo. As stated above, the non-malicious intention to harm another by interfering with an economic relationship or an at-will contract must be accompanied by a wrongful or unlawful act to be actionable.[4] Premo failed to allege that Bluegrass threatened violence, acted fraudulently, committed a crime, or threatened meritless civil suits or criminal prosecution, or that it acted with malice that was divorced from its legitimate commercial goals. Even if Bluegrass did harbor animosity toward

[4] We presume that Hilt's and Wilson's employment contracts with Premo were at-will because "employment in Maryland is presumptively at-will[.]" *Towson Univ. v. Conte*, 384 Md. 68, 79 (2004) (citing *Porterfield v. Mascari*, 374 Md. 402, 421–22 (2003)). Indeed, Premo has not asserted, on appeal or below, that Hilt and Wilson were employed for a term or that their contracts only were terminable for cause.

Premo, which Premo at best pleaded, only conclusorily, Bluegrass acted in its own commercial interests by making job offers to Hilt and Wilson, workers who had demonstrated on a temporary basis that they could perform the work that Bluegrass required.

In sum, Premo failed to allege that by offering employment to Hilt or Wilson Bluegrass acted wrongfully or unlawfully or with malice unrelated to its own commercial interests. Accordingly, Premo did not sufficiently plead its claim for tortious interference with prospective advantage, and the circuit court properly dismissed it.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.