

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY A. KUBAL,

Plaintiff/Cross-defendant-Appellee,

v

PAUL J. KELLEY a/k/a PAUL J. KELLY,

Defendant-Appellant,

and

PATRICIA A. KELLEY,

Defendant/Cross-Plaintiff-Appellant,

and

BETTY JANE YERINGTON,

Defendant/Cross-Plaintiff,

and

RRD HOLDINGS, LLC, POKAGON
PROPERTIES, LLC and GERALD W. HEPPLER,

Defendants.

Before: Hoekstra, P.J. and Jansen and Kelly, J.J.

PER CURIAM.

In this action alleging tortious interference with an assignment contract, defendants Patricia Kelley and Paul Kelley appeal by leave granted the trial court's order and judgment

UNPUBLISHED

June 30, 2005

No. 254205

Cass Circuit Court

LC No. 02-000041-CK

entered against Patricia Kelley for \$10,000.00 plus costs and interest and against Paul Kelley for \$100,000.00 plus costs and interest.¹ We affirm.

I. Basic Facts

This action concerns the sale of approximately 109 acres in Pokagon Township used as a gravel pit in the operations of Yerington Construction Company. In March 2000, plaintiff entered into a purchase agreement with Betty Jane Yerington “by Paul Kelley”, Patricia Kelley, and Gerald Heppler. Patricia Kelley signed the contract as an individual, but the contract identified her as the “IPR of the Estate of John S. Yerington.” John S. Yerington is Patricia Kelley’s deceased husband. The purchase agreement contained no prohibition on assignment. Before the closing on the property sale, plaintiff assigned her interest in the purchase agreement to defendant RRD Holdings, LLC (RRD) for an amount greater than the purchase price. RRD, in turn, assigned its interest to defendant Pokagon Properties, LLC (Pokagon). In a June 21, 2000, letter addressed to Betty Jane Yerington, Patricia Kelley (at Paul Kelley’s address) and Heppler, RRD’s and Pokagon’s attorney provided notification of the assignments and the closing time, date and location. In a letter signed by Paul Kelley dated June 22, 2000, Paul Kelley stated that he held a durable power of attorney for Patricia Kelley and Betty Jane Yerington. He further stated: “*We* have no intention of proceeding with this transaction as the land and contract were procured by fraud and material misrepresentations by [plaintiff]” (emphasis added). By telephone, Paul Kelley further informed RRD’s and Pokagon’s attorney that plaintiff defrauded the sellers because she stated that she was buying the property for her own use. RRD’s and Pokagon’s attorney responded that there were no prohibitions on assignment in the purchase agreement and, therefore, Pokagon would proceed to closing. On June 24, 2000, Paul Kelley addressed another letter to Pokagon’s attorney stating: “If [plaintiff] terminates the ‘contract’ *we* are willing to discuss a possible sale of the land to your clients. . . . [Plaintiff] has not performed as required under the contract. . . . if you choose to litigate, and lose, Betty and Patricia will never sell *their* interest to your clients” (emphasis added). The property was subsequently sold to Pokagon for \$25,000.00 more than the purchase price in the original purchase agreement. The contract with Pokagon was signed by Patricia Kelley “IPR” and Paul Kelley under durable power of attorney for Betty Jane Yerington.

II. Analysis

Defendants contend on appeal that the trial court erred in granting summary disposition in plaintiff’s favor on her claim of tortious interference against Patricia Kelley when Patricia Kelley was not a “seller,” but rather, acted solely as the personal representative of the estate of John S. Yerington. Defendants also contend that the trial court erred in granting summary disposition in plaintiff’s favor of her claim against Paul Kelley when he merely acted as an agent of the sellers. We disagree.

We review de novo a trial court’s decisions on the motions for summary disposition. Because the parties and the trial court relied on matters outside the pleadings, review under

¹ The claims against the other defendants were otherwise resolved and not at issue in this appeal.

2.116(C)(10) is appropriate. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). Summary disposition under MCR 2.116(C)(10) is appropriate if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

The trial court did not err in granting summary disposition in plaintiff's favor on her tortious interference claim against defendants Patricia Kelley and Paul Kelley. The elements of tortious interference with a contract are: (1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 382; 689 NW2d 145 (2004). Here, plaintiff alleged that defendants tortiously interfered with the assignment contract. The breach was Pokagon's failure to close on the assignment contract. Patricia Kelley and Paul Kelley instigated this breach when they refused to close on the purchase agreement assigned by plaintiff and, further, instigated Pokagon to abandon the assignment contract with plaintiff and instead deal directly with them in purchasing the property. On the basis of this record evidence, we conclude that the trial court did not err in determining that there was no genuine issue of material fact as to whether Patricia Kelley and Paul Kelley unjustifiably instigated Pokagon's breach of the assignment contract.

Neither of defendants' arguments on appeal is persuasive. Defendants first argue that Paul Kelley acted only as an agent of the sellers and, therefore, cannot be liable for tortious interference with plaintiff's assignment contract. In support of this argument, defendants rely on *Dzierwa v Michigan Oil Co*, 152 Mich App 281; 393 NW2d 610 (1986) and *Reed v Michigan Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). However, these cases are distinguishable from this case. In both *Dzierwa* and *Reed*, this Court held that the defendant agent could not be liable for tortious interference with a contract when the defendant agent was not a third party to the contract alleged to have been interfered with. *Dzierwa, supra; Reed, supra*. In this case, plaintiff has not alleged that the purchase agreement itself was interfered with. Rather, plaintiff has alleged that defendants interfered with the assignment contract between her and RRD. Paul Kelley was not an agent to any of the parties to the assignment contract. Therefore, *Dzierwa* and *Reed* are inapposite.

Defendants also assert that Patricia Kelley could not be held liable to plaintiff for tortious interference when Patricia Kelley was acting solely as the personal representative of the estate of John S. Yerington, not in an individual capacity. However, defendants have cited absolutely no authority for this proposition. A party cannot simply assert a position and then leave it to this Court to search for authority to support or reject that position. *Leitch v Switchenko*, 169 Mich App 761, 764; 426 NW2d 804 (1988).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly