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IN THE
COURT OF APPEALS OF INDIANA

BABYBACK'S INTERNATIONAL, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-0810-CV-946
	)	
THE COCA-COLA COMPANY and	)	
COCA-COLA ENTERPRISES, INC.,	)	
	)	
Appellees-Defendants.	)	
	)	
	)	
JP MORGAN CHASE BANK; MITCHELL	)	
HURST JACOBS & DICK, LLP; MONFORT,	)	
INC.; NEW CONCEPTS IN MARKETING, INC.,	)	
and DEVRO-TEEPAK, INC., BERRY	)	

PLASTICS CORPORATION, FOUR	)
MUSKETEERS, INC., f/k/a O'MALIA FOOD	)
MARKETS, INC. and	)
BEVERAGE AIR COMPANY,	)
	)
Interpleaded Parties.	)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0101-CT-62

July 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant Babyback's International, Inc. ("Babyback's") appeals the trial court's order granting Appellees', The Coca-Cola Enterprises, Inc. ("Coke Enterprises") and Coca-Cola Company ("COKE"), motions for summary judgment. Babyback's claims that the trial court erroneously granted summary judgment in favor of Coke Enterprises because constructive fraud excused the parties' non-compliance with the writing requirement of the Statute of Frauds and that in turn, the trial court erroneously granted summary judgment in favor of COKE because a valid contract existed between Babyback's and Coke Enterprises. We affirm.

FACTS AND PROCEDURAL HISTORY

The opinion of the Indiana Supreme Court in *The Coca-Cola Co., et al. v. Babyback's Int'l, Inc.*, 841 N.E.2d 557 (Ind. 2006) ("*Coca-Cola I*"), the parties' previous appeal to the Indiana Supreme Court, instructs us as to the underlying facts leading to this appeal:

> Early in 1997, Babyback's, a processor and seller of barbeque meat products, entered into an agreement with Hondo, Incorporated, d/b/a Coca-Cola Bottling Company Indianapolis, a/k/a Coca-Cola Bottling Company of Indianapolis, Inc. ("Coke Indy"), a bottler of Coca-Cola products with its main office in Chicago, and its market area including Indianapolis. Under this agreement Coke Indy was to pay Babyback's to arrange for and prominently place coolers in grocery stores in and around Indianapolis, displaying Babyback's products side-by-side in the coolers with Coca-Cola products. After Babyback's and Coke Indy experienced success with this "meals to go" concept in Indianapolis, [Coke Enterprises] and Babyback's began discussions about similarly co-marketing their products in the Louisville market, which was outside the Coke Indy territory but within that of [Coke Enterprises]. Babyback's thereafter arranged to have coolers delivered to several Louisville area grocery stores. At this time, Babyback's and [Coke Enterprises] did not have a written contract regarding this arrangement. Babyback's and [Coke Enterprises] representatives met on October 24, 1997, to discuss further expanding the arrangement into other [Coke Enterprises] market areas. Following this meeting, Babyback's faxed to [Coke Enterprises] a proposed contract. This contract, however, was never signed. On November 18, 1997, Babyback's and [Coke Enterprises] representatives met again, this time at [Coke Enterprises]'s Atlanta headquarters, to discuss expanding their co-marketing arrangement to stores on a nationwide basis.

841 N.E.2d at 560-61.

On November 19, 1997, a representative of Coke Enterprises drafted and faxed a memo to Babyback's, which stated that Coke Enterprises believed that the parties had made further strides toward reaching an agreement during their November 18th meeting, but cautioned that Babyback's objective to have an absolute agreement by the upcoming Friday would be difficult to achieve. Coke Enterprises attached a "recap" of the parties' discussion during the November 18th meeting to the memo. Also on November 19, 1997, the president of Babyback's sent a fax to Coke Enterprises stating, "I would like to emphasize that Babyback's … [is] taking pride in having reached an agreement with Coca-Cola Enterprises

and its first class rate organization." Appellant's App. p. 465. Later that same day, Coke Enterprises responded to Babyback's fax, stating:

> We have received your fax dated November 19 and feel compelled to remind you that contrary to your cover letter, we have not reached an agreement with your company.
>
> * * *
>
> Following a cursory review of the 'Agreement' you forwarded, we note a number of issues which will require further dialogue internally with our legal, financial and field sales management. We are very aware of your urgency to get this deal done, but request your patience. Though you have been working through the Coca-Cola USA group for some time, you have only recently engaged in dialogue with our company. The magnitude of your proposal demands we be thorough in evaluation.
>
> * * *
>
> As promised in our meeting, we have been, and will continue to treat your proposal with high priority, but unfortunately we will be unable to finalize an agreement with you in the timeframe you have outlined.

Appellant's App. p. 472. Babyback's responded to Coke Enterprises's fax the next day stating, "I am fully aware that we do not have a signed contract, but I left our Tuesday meeting with 100% confidence that [we] had reached a verbal agreement." Appellant's App. p. 473. Following these exchanges, Babyback's and Coke Enterprises continued discussions regarding co-marketing their products in the Atlanta market for some time. However, these discussions eventually terminated and the co-marketing program never materialized.

On December 31, 1998, Babyback's filed a complaint against Coke Enterprises and COKE alleging that Coke Enterprises had breached the parties' contract for a national co-marketing program, that Coke Enterprises had breached its fiduciary duty to Babyback's, that Coke Enterprises had engaged in constructive fraud, and that COKE had tortiously interfered

with the alleged contractual relationship between Babyback's and Coke Enterprises.[1] On April 1, 2003, COKE and Coke Enterprises filed separate motions for summary judgment which were subsequently denied by the trial court.

Concluding that the correspondence sent by Coke Enterprises satisfied the Statute of Frauds, this court affirmed the decision of the trial court on April 8, 2004. *Coca-Cola Co., et al. v. Babyback's Int'l, Inc.*, 806 N.E.2d 37 (Ind. Ct. App. 2004), *vacated by* 841 N.E.2d 557 (Ind. 2006). The Indiana Supreme Court reversed, holding that there was no writing sufficient to satisfy the Statue of Frauds.[2] *Coca-Cola I*, 841 N.E.2d at 565. The Supreme Court further held that the facts of the case did not permit application of the "part performance" or "promissory estoppel" exceptions which would remove the alleged oral agreement from the writing requirement of the Statute of Frauds. *Id*. at 565-70. The Supreme Court specifically held, "In light of [Coke Enterprises]'s immediate and unequivocal denial of the national agreement sought by Babyback's, it clearly was not reasonable for Babyback's to take any actions in reliance upon its belief that [Coke

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[1] Babyback's' original complaint also included claims against Coke Indy. Coke Indy, however, is not a party to this appeal.

[2] The Indiana Statute of Frauds provides, in relevant part:

> A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent:
>
> * * *
>
> (5) An action involving any agreement that is not to be performed within one (1) year from the making of the agreement.

Coca-Cola I, 841 N.E.2d at 562 (quoting Ind. Code § 32-21-1-1(b)).

Enterprises] had promised to perform the alleged national agreement." *Id.* at 570. The Supreme Court remanded the matter to the trial court for further proceedings. *Id.*

On remand, Babyback's filed amended contentions claiming that the alleged national agreement was not required to be in writing because the alleged constructive fraud by Coke Enterprises excused the parties' non-compliance with the writing requirement of the Statute of Frauds. COKE and Coke Enterprises again filed separate motions for summary judgment on September 27, 2006. The trial court granted both motions on January 2, 2007. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

When reviewing the propriety of a ruling on a motion for summary judgment, this court applies the same standard as the trial court. *Sees v. Bank One, Ind., N.A.*, 839 N.E.2d 154, 160 (Ind. 2005). The purpose of summary judgment is to terminate litigation when there is no material fact in dispute and the case can be determined as a matter of law. *Blackwell v. Dykes Funeral Homes, Inc.*, 771 N.E.2d 692, 695 (Ind. Ct. App. 2002), *trans. denied*. All evidence and reasonable inferences drawn from the evidence are construed in favor of the non-moving party. *Am. Legion Pioneer Post No. 340 v. Christon*, 712 N.E.2d 532, 534 (Ind. Ct. App. 1999), *trans. denied*. The moving party bears the burden of proving the absence of a genuine issue of material fact. *Id.*

Once the moving party has established that it is entitled to summary judgment, the non-moving party may not rest on mere allegations or denials in its pleadings but rather must

set forth specific facts which show the existence of a genuine issue of material fact that precludes entry of summary judgment. *Id*. A factual issue is material for the purposes of Indiana Trial Rule 56(C) if it bears on the ultimate resolution of a relevant issue. *Blackwell*, 771 N.E.2d at 695. A factual issue is genuine if it is not capable of being conclusively foreclosed by reference to undisputed facts. *Id*. As a result, despite conflicting facts and inferences on some elements of a claim, summary judgment may be proper where there is no dispute or conflict regarding a fact that is dispositive of the claim. *Id*. If the opposing party fails to meet its responsive burden, the court shall render summary judgment. *Id*.

II. Constructive Fraud Claim Against Coke Enterprises

Babyback's contends that the trial court erroneously granted summary judgment in favor of Coke Enterprises. Specifically, Babyback's alleges that the trial court's order is erroneous because Coke Enterprises engaged in constructive fraud which in turn excused the parties' oral multi-year national agreement from the Statute of Frauds requirement that the agreement be in writing. Initially, we observe that although Babyback's dedicated a notable portion of its appellate brief to establishing that constructive fraud may, under some circumstances, excuse non-compliance with the writing requirement of the Statute of Frauds, Babyback's has failed to adequately demonstrate that Coke Enterprises engaged in constructive fraud. Nevertheless, we will review whether, as a matter of law, Coke Enterprises engaged in constructive fraud and, if so, whether such fraud would exclude the parties' agreement from the writing requirement of the Statute of Frauds.

"Constructive fraud 'arises by operation of law from a course of conduct which, if

sanctioned by law, would secure an unconscionable advantage, irrespective of the existence or evidence of actual intent to defraud.'" *Allison v. Union Hospital, Inc.*, 883 N.E.2d 113, 122 (Ind. Ct. App. 2008) (quoting *Stoll v. Grimm*, 681 N.E.2d 749, 757 (Ind. Ct. App. 1997)). "Constructive fraud encompasses several related theories, all of which are based on the premise that there are situations which might not amount to actual fraud, but which are 'so likely to result in injustice that the law will find a fraud despite the absence of fraudulent intent.'" *Stoll*, 681 N.E.2d at 757 (quoting *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 324 (Ind. Ct. App. 1991)). The elements of constructive fraud are: (1) a duty existing by virtue of the relationship between the parties; (2) a violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when the duty to speak exists; (3) reliance thereon by the complaining party; (4) injury to the complaining party as a proximate result of the reliance; and (5) the gaining of an advantage by the party to be charged at the expense of the complaining party.[3] *Allison*, 883 N.E.2d at 123 (citing *Marathon Oil Co. v. Collins*, 744 N.E.2d 474, 480 (Ind. Ct. App. 2001)). In order to establish constructive fraud, the complaining party must have a reasonable right to rely upon the statements made or omitted. *Darst v. Ill. Farmers Ins. Co.*, 716 N.E.2d 579, 582 (Ind. Ct. App. 1999), *trans. denied*.

It is undisputed that on November 19, 1997, after receiving a fax from the president of

[3] It is true that in cases of a dominant-subservient or a fiduciary relationship, the complaining party does not have the burden to prove all five elements. *See Strong v. Jackson*, 777 N.E.2d 1141, 1146 (Ind. Ct. App. 2002). Here, however, there is nothing in the record to suggest that such a relationship exists.

Babyback's stating, "I would like to emphasize that Babyback's … [is] taking pride in having reached an agreement with Coca-Cola Enterprises," Coke Enterprises immediately responded stating, "We have received your fax dated November 19 and feel compelled to remind you that contrary to your cover letter, we have not reached an agreement with your company." Appellant's App. p. 465, 472. The president of Babyback's later acknowledged that the parties did not have a signed contract, but stated that he believed the parties had reached a verbal agreement. Contrary to this belief, however, the president of Babyback's and representatives for Coke Enterprises continued discussions regarding co-marketing their products in the Atlanta area until the discussions eventually terminated without a finalized agreement or plan regarding the nationwide co-marketing program.

The Indiana Supreme Court previously considered these same facts in *Coca-Cola I*, the parties' prior appeal in this matter, and held that summary judgment was proper with respect to Babyback's' promissory estoppel claim, because, as a matter of law, it was clearly unreasonable for Babyback's to take any actions in reliance upon its belief that Coke Enterprises had promised to perform the alleged national agreement. 841 N.E.2d at 570. Like the Supreme Court, we also conclude that, as a matter of law, it was clearly unreasonable for Babyback's to take any actions in reliance upon its belief that Coke Enterprises had promised to perform the alleged national agreement following Coke Enterprises's explicit rejection of Babyback's' claim that the parties had reached an agreement. Because Babyback's does not have a reasonable right to rely upon its belief that the parties had entered into a national agreement, Babyback's will be unable to successfully

establish that Coke Enterprises engaged in constructive fraud, s*ee Darst*, 716 N.E.2d at 582. Therefore, in light of the parties' failure to satisfy the writing requirement of the Statute of Frauds, no valid contract existed between Babyback's and Coke Enterprises. *See Coca-Cola I*, 841 N.E.2d at 565 (providing that the memo sent from Coke Enterprises to Babyback's on November 19, 1997, recapping the parties' November 18, 1997 discussion did not satisfy the Statute of Frauds).

Further, it is well-established that "parties may not rely on a contractual relationship to create a duty that, if breached, would form the basis of a constructive fraud claim." *Allison*, 883 N.E.2d at 123; *Whiteco Indus., Inc. v. Kopani*, 514 N.E.2d 840, 844 (Ind. Ct. App. 1987), *trans. denied*.

> Were this not the rule the statute would be rendered virtually meaningless because the frustrated claimant would always assert an oral promise/agreement to defeat by means of estoppel [or constructive fraud] the statute's requirement for a written one. The contest would then concern the credibility of the evidence of an oral promise or agreement. That, of course, is precisely what the statute seeks to avoid.

Whiteco, 514 N.E.2d at 844. Therefore, insomuch as the only possible basis for Coke Enterprises's duty to Babyback is the alleged contract, we can only conclude that Babyback's has failed, as a matter of law, to establish that it is entitled to relief on its constructive fraud claim. Consequently, we conclude that the trial court properly entered summary judgment in Coke Enterprises's favor on this claim.

III. Tortious Interference Claim Against COKE

Babyback's also contends that the trial court erred in granting summary judgment in favor of COKE. Specifically, Babyback's argues that, if the parties' noncompliance with the

writing requirement of the Statute of Frauds was excused by constructive fraud, then summary judgment was inappropriate on its claim that COKE tortiously interfered with Babyback's contract with Coke Enterprises.

> Indiana has long recognized that intentional interference with a contract is an actionable tort, and includes any intentional, unjustified interference by third parties with [a] … contract. The tort reflects the public policy that contract rights are property, and under proper circumstances, are entitled to enforcement and protection from those who tortiously interfere with those rights.

Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1234 (Ind. 1994). A plaintiff alleging tortious interference with a contractual relationship must establish five elements: (1) the existence of a valid and enforceable contract; (2) the defendant's knowledge of the existence of the contract; (3) the defendant's intentional inducement of the breach of the contract; (4) the absence of justification; and (5) damages resulting from the defendant's wrongful inducement of the breach. *Allison*, 883 N.E.2d at 118.

It is undisputed that Babyback's' claim against COKE for tortious interference can be successful only if a valid and enforceable contract exists between Babyback's and Coke Enterprises. In fact, Babyback's explicitly acknowledges that its tortious interference claim against COKE is viable "only if constructive fraud can take the National Contract out of the Statute of Frauds." Appellant's Br. p. 30. Therefore, having concluded above that there was no valid contract because, as a matter of law, it was clearly unreasonable for Babyback's to take any actions in reliance upon its belief that Coke Enterprises had promised to perform the alleged national agreement, we conclude that the trial court did not err in determining that COKE was entitled to summary judgment.

The judgment of the trial court is affirmed.

MAY, J., and BROWN, J., concur.