SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0943-15T2

CURTIS LACKLAND,
CORPORATE EMPLOYEE
BENEFITS, LLC,

Plaintiffs-Appellants,

v.

BROWN & BROWN METRO, INC.,

Defendant-Respondent.

Argued December 15, 2016 – Decided June 29, 2017

Before Judges Lihotz and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-3490-13.

George N. Polis argued the cause for appellants.

Thomas J. Cahill argued the cause for respondent (Satterlee Stephens Burke & Burke, L.L.P., and Louis Charles Shapiro, P.A., attorneys; Mr. Cahill and Mr. Shapiro, of counsel and on the brief).

PER CURIAM

Plaintiff Corporate Employee Benefits, L.L.C. (CEB) and defendant Brown & Brown Metro, Inc., are competing insurance

brokers; plaintiff Curtis Lackland is a principal in CEB. In this action for tortious interference with a prospective economic advantage, plaintiffs appeal from a September 18, 2015 Law Division order granting defendant summary judgment dismissal. We affirm.

I

In 2011, the Asbury Park Board of Education (Board) issued a request for proposal, in which it sought bids for insurance brokerage services. At the time, defendant had been the broker of record for the Board every academic year since 1999. Both CEB and defendant submitted responses to the Board's request for proposal.

On June 29, 2011, the Board voted to select CEB as its broker for the 2011-2012 academic year. Present at the meeting was the State appointed monitor, Lester Richens.[1] After the

[1] In 2006, the Legislature passed the School District Fiscal Accountability Act (Act), N.J.S.A. 18A:7A-54 to -60, to address the problem of some school districts' failure to correct various deficiencies identified in their annual audits. Assembly Appropriations Comm., Statement to Assembly Bill No. 2684 (Mar. 13, 2006). The Act authorizes the Commissioner of the Department of Education to appoint a monitor "to provide direct oversight of a board of education's business operations and personnel matters" when a school district receives an adverse opinion by its independent auditor or demonstrates two or more fiscal shortcomings as delineated in the Act. N.J.S.A. 18A:7A-55(a). Once appointed, the monitor has the authority, among other things, to:

vote, Richens informed the Board he wanted to take the matter "under advisement." On June 30, 2011, Richens overrode the Board's decision to appoint CEB as the broker of record, directing instead defendant be the broker of record for some kinds of insurance, but CEB be the broker of record for other forms of insurance.

Specifically, the monitor directed defendant be the broker of record for "all insurances placed with the New Jersey School Boards Association Insurance Group," and that CEB be the broker

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> (1) oversee the fiscal management and expenditure of school district funds, including, but not limited to, budget reallocations and reductions, approvals of purchase orders, budget transfers, and payment of bills and claims;
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> . . . .
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> (5) . . . override . . . a vote by the board of education on any of the matters set forth in this subsection, except that all actions of the State monitor shall be subject to the education, labor, and employment laws and regulations
> . . . .
>
> [N.J.S.A. 18A:7A-55(b).]

The parties did not inform us why a monitor was appointed to oversee the fiscal management and expenditures of the Asbury Park school district, but there is no dispute the monitor possessed the authority to override decisions of the Board, in accordance with this Act, including the decision before the Board at issue here.

of record for the following forms of insurance: "School Board's Legal Liability[,] Student Accident Insurance, Workman's Compensation SAIF[,] and Medical and Dental coverage."[2] In a memorandum submitted to the Board dated June 30, 2011, Richens noted he arrived at his decision after "working most of the day with" CEB, defendant, the New Jersey School Boards Association Insurance Group, and SAIF. He also stated it was

> understood CEB must qualify to participate in SAIF (Workman's Compensation Carrier) to be the broker of record. [CEB has] represented that [it] will file the necessary paperwork with SAIF and that [it] further understand[s] that if [it does] not qualify to be a member of SAIF[,] the Workman's Compensation Insurance will revert back to [defendant].

The following day, July 1, 2011, defendant submitted a letter to Richens, "strongly recommending that the Board revisit its decision to award" certain insurance policies to CEB. The letter emphasized defendant's experience and expertise in servicing school districts. Among other things, defendant noted it had successfully secured various forms of coverage for the Asbury Park school district from A-rated insurance carriers, but

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[2] SAIF stands for the School Alliance Insurance Fund. Formed over twenty years ago, SAIF operates as a joint insurance fund, and is registered with and regulated by the New Jersey Department of Banking and Insurance and the Department of Community Affairs. SAIF specializes in providing certain forms of coverage to school districts. Here, SAIF has provided the Board with workers compensation coverage since 2006.

at a cost within the district's budget; identified and corrected various deficiencies insofar as the kind of bonds the school district was required to have; and had a large staff, which enabled it to meet all of the Board's needs. Defendant pointed out CEB had no experience servicing school districts, and had only one person on staff qualified to service the Board's needs.

In accordance with the monitor's decision, on July 18, 2011, the Board passed a resolution appointing defendant and CEB as broker of record for those specific forms of insurance outlined by the monitor in his June 30, 2011 memorandum. Consistent with Richens' memorandum, the Board also noted in its resolution whether CEB would be the broker to provide workers compensation coverage would depend upon whether CEB were approved by SAIF. It is not disputed SAIF failed to approve CEB, and it was conceded CEB was not qualified to do business with SAIF at the time in question. Defendant informs it did become the broker of record to provide workers compensation coverage for the Board.

In 2013, plaintiffs filed a complaint alleging defendant tortiously interfered with a prospective economic advantage. The plaintiffs' sole contention is defendant's July 1, 2011 letter "falsely imput[ed] disqualifying or ineligibility triggering criteria," which was "intended to interfere with the

Board's appointing CEB as Insurance Broker of Record" for the district.

After discovery concluded, defendant moved for summary judgment, arguing the July 1, 2011 letter could not have had any impact upon the monitor's decision to override the Board's determination to appoint CEB to serve as the broker of record for all of its insurance needs, because the monitor made his decision to override the Board on June 30, 2011. In addition, defendant argued the points it made about CEB in its July 1, 2011 letter were derived from either CEB's or the Department of Banking and Insurance's website and, in any event, were accurate.

During Lackland's deposition, he stated he was not aware of any comments defendant made about CEB he considered disparaging, other than what was contained in the July 1, 2011 letter. During oral argument on the motion, plaintiffs' counsel conceded Richens did not receive the July 1, 2011 letter in advance of making his decision on June 30, 2011, to override the Board and direct defendant be the broker of record for some forms of insurance. However, during the argument, plaintiffs advanced a new theory of liability.

Specifically, plaintiffs argued Dominick S. Cinelli, a senior vice president of defendant, may have communicated with

Richens and the Board at the June 29, 2011 Board meeting, or with Richens on June 30, 2011. Acknowledging they had no direct evidence, plaintiffs pointed out Richens stated in his June 30, 2011 memorandum that he had communicated with plaintiffs and defendant on this day. Plaintiffs posited defendant may have induced Richens to require CEB be qualified by SAIF before CEB could obtain coverage through this fund for the Board's benefit.

The trial court adjourned the motion to enable plaintiffs to file papers in support of this new factual claim, but they failed to do so. Cinelli, however, submitted an affidavit averring defendant never urged Richens or the Board to require CEB qualify with SAIF in order to provide workers compensation coverage to the Board. Cinelli also added that, in his experience, SAIF had always required brokers to be approved by it before it would permit a person or entity to broker a SAIF product.

The trial court granted defendant's motion. In its oral opinion, the court stated:

> Even giving the plaintiff[s] the benefit of all legitimate inferences as the court must do under Rule 4:46-2, the court cannot say that there is sufficient evidence by which a reasonable juror could conclude that the defendant tortuously interfered with the defendant's prospective economic advantage. There is simply a dearth of admissible evidence with respect to what, if anything,

> was communicated between Dr. Richens and the defendant[] on June 30, 2011. The court recognizes the significance of circumstantial evidence and inferences drawn in favor of the non-moving party. Under the facts of this case, however, it is pure speculation to suggest that the defendant somehow prevailed upon Dr. Richens to require CEB to qualify for SAIF. . . . More importantly, Doctor Richens was never deposed to explore what transpired on June 29th through June 30th prior to his awarding the contract in this matter. There was also no testimony from any representative from SAIF or Mr. Cinelli. In short, the plaintiff[s]' argument appears to be pure speculation.

II

On appeal, plaintiffs contend the trial court failed to take into consideration the circumstantial evidence and accord to them all of the legitimate inferences to which they, as the non-moving parties, were entitled. Thus, they argue, they are entitled to have this matter decided by a jury. We disagree and affirm.

We review the trial court's grant of summary judgment de novo, employing the same standard used by the trial court. Davis v. Devereux Found., 209 N.J. 269, 286 (2012); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). If there are no material facts in dispute, we consider whether, viewing the undisputed facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a

matter of law. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005).

To prove tortious interference with prospective economic advantage, a party must show the following:

> First, the complaint "must allege facts that show some protectable right--a prospective economic or contractual relationship. Although the right need not equate with that found in an enforceable contract, there must be allegations of fact giving rise to some 'reasonable expectation of economic advantage.'" Second, "the complaint must allege facts claiming that the interference was done intentionally and with 'malice.' . . . [M]alice is defined to mean that the harm was inflicted intentionally and without justification or excuse." Third, "the complaint must allege facts leading to the conclusion that the interference caused the loss of the prospective gain. A plaintiff must show that 'if there had been no interference[,] there was a reasonable probability that the victim of the interference would have received the anticipated economic benefits.'" Fourth, "the complaint must allege that the injury caused damage."
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> [Macdougall v. Weichert, 144 N.J. 380, 404 (1996) (citations omitted) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751-52 (1989)).]

Here, the record is devoid of evidence, circumstantial or otherwise, or any inferences to be drawn, that defendant interfered with plaintiffs' economic or contractual relationship with the Board. As plaintiffs candidly admitted during oral

argument, defendant's July 1, 2011 letter to Richens was not released to or viewed by him before he issued his June 30, 2011 memorandum directing defendant be the broker of record for some forms of insurance. We need not reach whether any of the contents of the July 1, 2011 letter even rose to the level of malice, because there is no dispute the letter was not seen by Richens before he overrode the Board's June 29, 2011 vote.

Second, there is no evidence or inference to be drawn defendant suggested to Richens that CEB be qualified by SAIF before CEB were to obtain coverage from SAIF for the benefit of the Board, not to mention the very obvious point the decision whether to impose such a condition belonged solely to SAIF.

Plaintiffs also argue the July 1, 2011 letter may have influenced the Board when it passed the resolution on July 18, 2011, to memorialize Richens' decision. Putting aside the fact the decision to permit defendant to be the broker of record for certain forms of insurance was Richens' decision and not the Board's, this argument was not raised before or decided by the trial court. Plaintiffs also suggest the request for proposal issued by the Board did not comply with the New Jersey Public Contracts Law, N.J.S.A. 40A:11-1 to -2.1; this argument also was neither raised before nor decided by the trial court.

"Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012). Thus, even if these two arguments had been raised, the trial court did not address them in its opinion and, thus, we decline to do so in the first instance. Duddy v. Gov't Emps. Ins. Co., 421 N.J. Super. 214, 221 (App. Div. 2011).

To the extent we have not addressed any of plaintiffs' remaining arguments, it is because they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.