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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1164

Filed: 15 December 2020

Mecklenburg County, No. 18 CVS 4097

MOLLY SCHWARZ, Plaintiff,

v.

THOMAS J. WEBER, JR, D.O., Defendant.

Appeal by Plaintiff from orders entered 1 August 2019 by Judge Adam Conrad in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 August 2020.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for Plaintiff-Appellant.

Everett Gaskins Hancock LLP, by Michael J. Byrne, for Defendant-Appellee.

DILLON, Judge.

Plaintiff appeals from an Order granting Defendant's Motion for Summary Judgment and from an Order denying Plaintiff's Emergency Motion to Deem Plaintiff's First Request for Admissions to be Admitted. We affirm.

I. Background

SCHWARZ V. WEBER

Opinion of the Court

This case involves the termination of Molly Schwarz (“Plaintiff”) from her employment with St. Jude Medical, Inc. (“St. Jude”). Much of the factual background can be found in *Schwarz v. St. Jude Med., Inc.*, ___ N.C. App. ___, 842 S.E.2d 119 (2020). Plaintiff brought the prior case against St. Jude, a co-worker, her direct supervisor, and Duke University Health System (“Duke”). St. Jude and Duke were granted summary judgment in that prior lawsuit, a decision we affirmed on appeal. *Id.* at ___, 842 S.E.2d at 127.

In 2018, Plaintiff filed this present action for tortious interference against Thomas J. Weber, Jr., (“Defendant”) alleging that his actions led to her termination. Defendant filed a motion for summary judgment, arguing that the three-year statute of limitations was a bar to Plaintiff’s claim and that Plaintiff lacked sufficient evidence to make out her claim of tortious interference with contract. The trial court granted Defendant’s motion for summary judgment. Plaintiff timely appealed.

II. Standard of Review

We review a trial court’s decision on summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Summary judgment is appropriate when the record shows that “there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Id.* at 524, 649 S.E.2d at 385.

III. Analysis

Plaintiff makes several arguments on appeal. We address each in turn.

A. Credibility of Witnesses and Weight of the Evidence

Plaintiff first argues that summary judgment should not have been granted because there were questions as to the credibility of Defendant's witnesses and the weight of the evidence. We disagree.

Plaintiff cites various case law for the proposition that if there are questions as to the credibility of a movant's witnesses, summary judgment must be denied. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979); *see also Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976); *see also Shearin v. Indemnity Co.*, 27 N.C. App. 88, 218 S.E.2d 207 (1975). However, Plaintiff ignores the statute of limitations bar in this case argued by Defendant to the trial court and in his appellate brief. We need not decide this case under witness credibility if the evidence shows as a matter of law that the claims are barred by a statute of limitations.

A claim for tortious interference with contract has a three-year statute of limitations. N.C. Gen. Stat § 1-52(1), (5) (2014) (providing a three-year statute of limitations for "an action . . . [u]pon a contract [or] arising out of a contract" or "not arising on contract"); *Philips v. Pitt Cnty. Mem'l Hosp., Inc.*, 222 N.C. App. 511, 521, 731 S.E.2d 462, 469 (2012). The statute of limitations begins to run when the alleged tortious interference occurs. *Philips*, 222 N.C. App. at 520, 731 S.E.2d at 469.

In her complaint, Plaintiff alleged that Defendant's tortious conduct was "bann[ing] Plaintiff from the property of Duke University and Duke University Health System, Inc. in Wake County." The evidence below showed that Defendant called Plaintiff's supervisors on 2 July 2014 to inform them he no longer wanted to work with Plaintiff. Consequently, the three-year statute of limitations on Plaintiff's tortious interference claim expired on 2 July 2017. Although Plaintiff filed her companion case within this time frame, she did not file the complaint, asserting claims against Defendant, in our current case until 27 February 2018. Additionally, Plaintiff only addresses the statute of limitations issue in her reply brief. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Therefore, we disagree with Plaintiff's argument and conclude that the trial court correctly granted Defendant's summary judgment motion.

B. Claim for Tortious Interference with Contractual Rights

Plaintiff also argues that she produced sufficient evidence to make out a claim of tortious interference with contractual rights. We disagree.

Assuming *arguendo* that Plaintiff's claim was not barred by the statute of limitations, she did not make out a sufficient claim for tortious interference with contract, the elements of which are as follows:

- (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against the third person;
- (2) the defendant knows of the contract;

- (3) the defendant intentionally induces the third person not to perform the contract;
- (4) and in doing so acts without justification;
- (5) resulting in actual damage to plaintiff.

United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988).

Defendant argues that Plaintiff did not present sufficient evidence of any of the five elements, specifically attacking Elements Three, Four, and Five. As to Element Three, we agree that Plaintiff did not forecast sufficient evidence of Defendant intentionally inducing St. Jude not to perform its contract with Plaintiff.

In order to establish the third element, there must be sufficient evidence that the defendant pursued the plaintiff's termination. *See Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 745, 641 S.E.2d 695, 697 (2007) ("Plaintiff has not produced any evidence indicating defendants actually sought the termination of plaintiff's employment[.]"); *see also White v. Cross Sales & Eng'g Co.*, 177 N.C. App. 765, 769, 629 S.E.2d 898, 901 (2006). This evidence may include actions such as demanding that a plaintiff be fired or providing an "incentive" to the employer for firing the plaintiff. *White*, 177 N.C. App. at 769, 629 S.E.2d at 901.

Here, there was no evidence that Defendant actually sought Plaintiff's termination.¹ Defendant instructed Plaintiff's supervisor that Plaintiff was no longer

¹ We came to a very similar conclusion in Plaintiff's companion case. *Schwarz v. St. Jude Med., Inc.*, ___ N.C. App. ___, ___, 842 S.E.2d 119, 127 (2020) (internal quotation marks omitted) ("There is no evidence that Duke intentionally induced St. Jude to terminate its employment contract with [Plaintiff].").

welcome at Defendant's medical office due to inappropriate behavior around patients. This message was not accompanied by a request to fire Plaintiff or an incentive to St. Jude. Despite Plaintiff's claim that she was banned from Defendant's entire medical building where other medical practices were located, she continued to service those practices. Additionally, Plaintiff continued her employment with St. Jude for eight months after she was "banned" from Defendant's premises.

Finally, Plaintiff makes the claim that Defendant essentially banned her from eighty-five percent (85%) of her account territory in excluding her from Defendant's office. Plaintiff argues that this action would necessarily result in her termination from St. Jude. However, Plaintiff misstates the evidence. First, we note that the evidence presented to the court showed that Plaintiff's role was reduced or eliminated from some locations due to her own professional misbehavior. Second, the eighty-five percent (85%) figure refers to much of Plaintiff's territory as a whole, more than Defendant's sole medical practice.

Because Plaintiff was required to prove all elements to succeed, we need not address the last two remaining elements in our analysis. *See White*, 177 N.C. App. at 770, 629 S.E.2d at 902 ("A plaintiff must prove all of the elements of a tort, and because plaintiff here cannot show that [the defendant] intentionally induced [her employer] to fire her, we need not address [other elements.]"). We do not consider the

issues of whether Defendant acted with justification or whether his actions resulted in actual damage to Plaintiff.

C. Order denying Plaintiff's Emergency Motion to Deem Plaintiff's First Request for
Admissions to be Admitted

Plaintiff has presented no argument concerning the trial court's remaining order from which she appealed. Therefore, we affirm the trial court on this issue. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

IV. Conclusion

We affirm the trial court's Order granting Defendant's Motion for Summary Judgment and Order denying Plaintiff's Emergency Motion to Deem Plaintiff's First Request for Admissions to be Admitted.

AFFIRMED.

Chief Judge McGEE concurs.

Judge MURPHY concurs in result only.

Report per Rule 30(e).