

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DONALD R. WILD and
DIANA H. WILD,

Plaintiffs,

v.

KARLEEN HILLERY,

Defendant.

ORDER

01-C-461-C

01-C-463-C

These consolidated cases are before the court to clean up one housekeeping matter involving defendant Karleen Hillery's second motion to strike. Through an oversight, plaintiffs were not provided an opportunity to brief this motion before it was decided as part of defendant's motion for summary judgment. When plaintiffs advised the court that they had not had an opportunity to be heard on the motion, I vacated the judgment in defendant Hillery's favor and set a briefing schedule. Plaintiffs have now had a full opportunity to oppose the motion to strike; despite the opportunity, they have failed to show why the motion should not have been granted.

1. Plaintiffs' affidavits

Defendant's second motion to strike focused on seven matters. The first concerned the January 12, 2003 affidavits of plaintiffs, which defendant contended were sham affidavits that contradicted previous evidence by plaintiffs. Plaintiffs argue that the affidavits were not contradictory, that in fact they tracked statements plaintiffs had made previously in their December 2000 depositions. Plaintiffs are wrong.

In their affidavits, Dkt. #130, Exhs. #4 and #9, plaintiffs averred that their son Joseph had let them know that he had researched Subscriptions Plus, Inc., looked at the internet website for the company and had relied on the information set forth on the website in making his decision to take a job with the company. Both plaintiffs swore that "Joe let me know that he had viewed the internet website and relied on it and on the information contained therein about the conditions of the job that had been offered to him." Exh. #4 at 3, Exh. #9 at 3. Both plaintiffs swore that they had viewed the website at Joseph's urging, that they had discussed the information with Joseph and that Joseph had told them that "based upon the information he believed Subscriptions Plus, Inc. was a corporation that was going to provide him with safe transportation, put him in good hotels, and provide him with travel and good pay, etc., all as represented in the website." Id.

It is true, as plaintiffs argue, that they testified at their depositions that Joseph had said that "they" were going to take care of his transportation and lodging and hold his

earnings for him so that he would have a lump sum distribution when he finished working.” However, plaintiffs never testified that Joseph had obtained this information from the website or relied on any representations included on it. In fact, at their depositions they were unable to say where Joseph had obtained his information. In their recently filed brief in opposition to the motion to strike, they say that it is “obvious” from their deposition testimony that Joseph had obtained his information from the website.

Contrary to plaintiffs’ spin on the testimony, it is not obvious that Joseph Wild obtained his information from the website, but the point is not worth pursuing. As I noted in the decision on the motions for summary judgment, whatever plaintiffs have to say about what their son told them is inadmissible hearsay, Op. and order entered Mar. 14, 2003, dkt. #187, at 17-18, and cannot be considered in deciding defendant’s motion for summary judgment. Plaintiffs have not persuaded me that it was error to grant defendant’s motion to strike their affidavits as sham or that denying the motion would have changed the outcome of defendant’s motion for summary judgment.

2. Choan Lane’s January 19, 2001 affidavit

Plaintiffs argue that it was error to strike this affidavit just because the court had ruled in case 00-C-0067-C that Lane could not testify on any matter as to which he had claimed Fifth Amendment protection. They maintain that a ruling in another case should not govern

this case because defendant has no basis on which to argue that Lane would continue to invoke the Fifth Amendment now that he has been convicted and sentenced. Plaintiffs argue that, if the affidavit cannot be used, the court should deny defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(f), which allows the court to deny a motion for summary judgment or order a continuance when it appears "that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition."

Plaintiffs are confused about the burdens on this issue. They are seeking to rely upon an affidavit they obtained in connection with their earlier suit without showing why the court's ruling in that case striking the affidavit does not bar them from relying on it in this case or any other. Had they wanted to use Lane's affidavit, they could have arranged for another deposition of him, to determine whether he would be willing to testify at this time so as to give the court some reason for reconsidering the ruling in the earlier case. In fact, it appears from defendant's counsel's affidavit that an effort was made in the earlier case to depose Lane *after* he had been sentenced and that Lane continued to claim his Fifth Amendment protections.

Rule 56(f) does not come into play because plaintiffs have not shown that they could ever obtain the testimony they want from Lane. Therefore, there would be no reason to deny the motion for summary judgment or even to delay a decision on the motion so as to enable plaintiffs to obtain additional discovery. Moreover, plaintiffs have not shown that

Lane would be in a position to testify to the critical evidence they need. Plaintiffs relied on the affidavit in opposing defendant's proposed finding of fact to the effect that neither defendant nor Subscriptions Plus, Inc. had ever entered into any agreement of any kind with Joseph Wild. They did so not because Lane had averred that there was an agreement with Joseph, but because Lane's averments contradicted certain other testimony and averments provided by defendant and therefore showed, in plaintiffs' opinion, that her statements were unreliable in general. Showing that defendant is unreliable does not prove the existence of an agreement.

Plaintiffs have failed to show that the decision to strike the January 19, 2001 affidavit was erroneous.

3. Judge Albert's November 21, 2001 decision on personal jurisdiction

Plaintiffs acknowledge that Wis. Stat. § 801.08(2) bars them from relying on *factual* determinations that the state court made in finding that it could exercise personal jurisdiction over defendant but they maintain that they can use the *legal* conclusion that the state court reached, which is that defendant is the alter ego of Subscriptions Plus, Inc. Plaintiffs mischaracterize the nature of the conclusion. It is not a legal conclusion but a factual one, made in connection with the determination that a Wisconsin court could exercise personal jurisdiction over defendant. Therefore, it falls under the prohibition in §

801.08(2).

4. Plaintiffs' strict responsibility claim

Plaintiffs contend that it was error to strike their claim of strict responsibility on the ground that plaintiffs had never alleged it in any pleading but mentioned it for the first time in their brief in opposition to defendant's motion for summary judgment. Citing Midwest Commerce Banking Co. v. Elkhart City Centre, 4 F.3d 521, 523 (7th Cir. 1993), they argue that a plaintiff is not required to explain the theory of its case but merely "the misrepresentation, omission or other action or inaction that the plaintiff claims was fraudulent." Plaintiffs' argument would have force if they were making it at the outset of their case, in opposition to a motion to dismiss. It has no force when they make it after more than three years of discovery and briefing in three cases all involving the same claims against the same defendants and after they have been ordered to state their claims with precision and specificity if they wished to avoid dismissal.

Plaintiffs were allowed to go forward with their claims of intentional misrepresentation. It is doubtful whether strict liability misrepresentation constitutes *intentional* misrepresentation. The Wisconsin courts categorize causes for misrepresentation as based on "intent, negligence, or strict responsibility." Reda v. Sincaban, 145 Wis. 2d 266, 268, 426 N.W.2d 100, 102 (Ct. App. 1988) (quoting Gauerke v. Rozga, 112 Wis. 2d

271, 277, 332 N.W.2d 804, 807 (1983)). The elements of the tort of strict responsibility misrepresentation include (1) a misrepresentation of fact (2) that is untrue and (3) made by the defendant as a fact on the basis of his own personal knowledge or in circumstances in which he necessarily ought to have known the truth or untruth of the statement and (4) in a transaction in which he had an economic interest. Finally, (5) the plaintiff must have believed such representation to be true and relied on it. Id. at 268-69, 426 N.W.2d at 102.

Even if plaintiffs had been authorized to plead a new claim, they cannot prove the prerequisites of strict responsibility misrepresentation. As I explained at length in the March 14 order, plaintiffs cannot establish that defendant made any misrepresentations of fact that plaintiff believed and upon which he relied to his detriment.

5. Plaintiffs' supplemental materials

Plaintiffs assert that they had obtained leave of court to file the pleadings that defendant moved to strike as untimely (plaintiffs' supplemental brief in opposition to defendant's motion for summary judgment and plaintiffs' supplemental response to defendant's proposed conclusions of law). It appears that plaintiffs are correct. However, it does not follow that it was error to strike the materials or that not doing so would have made any difference in the outcome of the motion for summary judgment.

Plaintiffs' supplemental brief included a new claim against defendant Hillery that

plaintiffs had not alleged in any prior pleadings: the alleged violation of Wis. Stat. § 100.18(9)(a). (A review of § 100.18 suggests that (1) is the prohibitory subsection of the statute; (9) merely defines the “deceptive advertising” that subsection (1) prohibits. Subsection (11)(b) gives individuals the right to sue if they suffer pecuniary loss because of a violation of the statute.) This statute prohibits advertising relating to employment or to the terms and conditions of employment if the advertisement is part of a plan or scheme whose purpose is not to hire as advertised. Plaintiffs cite this statute as fleshing out the elements of their civil conspiracy claim, on which they were allowed to proceed. They contend that even if they cannot prove that defendant made false statements to Joseph Wild, she would still be liable for the representations made by Thomas Cole, who put the allegedly false information on the website, because they were participating in a common scheme or plan to provide false information to prospective independent contractors.

At the advanced stage at which plaintiffs tried this “amendment by briefing,” they were far too late to introduce new theories of liability. It is not enough for them to argue that they had alleged a scheme to engage in false advertising; they had never alerted defendant to the fact that they were proceeding under a theory that defendant had conspired with others to violate § 100.18.

Moreover, even if plaintiffs had pleaded their theory properly, they could not prevail unless they could show Joseph Wild’s reliance on the allegedly false advertising and a causal

connection between the advertising and the injury that plaintiffs suffered. As the district court pointed out in Valente v. Sofamor, S.N.C., 48 F. Supp. 862, 874 (E.D. Wis. 1999), “to maintain private causes of action for violations of § 100.18(1), the plaintiffs must suffer a pecuniary loss caused by a violation of the statute.” Plaintiffs cannot make that showing in this case. Therefore, they were not prejudiced by the striking of their supplemental brief containing their effort to add a new claim to their case or to flesh out an old claim.

6. Defendant Hillery’s intentional misrepresentations to plaintiffs

_____ Plaintiffs deny having made any claims for misrepresentations that defendant made directly to them. They do not oppose defendant’s motion to strike this alleged claim.

7. Sanctions

Plaintiffs do not wish to be heard on defendant Hillery’s request for sanctions because I have ruled in their favor on this request.

ORDER

Having reconsidered defendant Karleen Hillery’s second motion to strike, filed on January 24, 2003, in light of the briefing submitted by plaintiffs Donald R. Wild and Diana H. Wild, I conclude that plaintiffs have failed to show that I erred in deciding the motion.

Therefore, that portion of the March 14, 2003 order addressing the second motion to strike is REAFFIRMED. The April 10, 2003 order vacating the judgment in this case is VACATED. The clerk of court shall re-enter judgment in the form entered on March 24, 2003.

Entered this 29th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge